DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-38
Title: John E. Wetzel, Secretary, Pennsylvania Department of Corrections, et al., Petitioners
v.
James Lambert
Docketed: July 7, 2011
Linked with 10A1160
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (07-9005)
Decision Date: February 7, 2011
Rehearing Denied: March 7, 2011

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 23 2011	Application (10A1160) to extend the time to file a petition for a writ of certiorari from June 5, 2011 to July 5, 2011, submitted to Justice Alito.
May 26 2011	Application (10A1160) granted by Justice Alito extending the time to file until July 5, 2011.
Jul 5 2011	Petition for a writ of certiorari filed. (Response due August 8, 2011)
Aug 5 2011	Brief of respondent James Lambert in opposition filed.
Aug 5 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 17 2011	DISTRIBUTED for Conference of September 26, 2011.
Aug 24 2011	Reply of petitioners John E. Wetzel, Secretary, Pennsylvania Department of Corrections, et al. filed. (Distributed)
Sep 2 2011	Application (11A264) for a stay pending disposition of the petition for a writ of certiorari, submitted to Justice Alito.
Sep 7 2011	Record Requested .
Sep 8 2011	Response to application (11A264) requested by Justice Alito, due September 14, 2011, by 4 p.m.
Sep 14 2011	Response to application from respondent James Lambert filed.
Sep 16 2011	Reply of applicant John E. Wetzel, Secretary, Pennsylvania Department of Corrections, et al. filed.
Sep 26 2011	Record received from the United States Court of Appeals for the Third Circuit (one DVD).
Oct 4 2011	Record received from U.S. District Court Eastern District of Pennsylvania (one box).
Oct 5 2011	DISTRIBUTED for Conference of October 28, 2011.
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Nov 28 2011	DISTRIBUTED for Conference of December 2, 2011.
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Dec 19 2011	DISTRIBUTED for Conference of January 6, 2012.
Jan 9 2012	DISTRIBUTED for Conference of January 13, 2012.
Jan 17 2012	DISTRIBUTED for Conference of January 20, 2012.
Feb 3 2012	DISTRIBUTED for Conference of February 17, 2012.
Feb 21 2012	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 21 2012	Petition GRANTED. Judgment VACATED and case REMANDED Justice Breyer, with whom Justice Ginsburg and Justice Kagan join, dissenting. Opinion per curiam. (Detached Opinion)
Mar 26 2012	JUDGMENT ISSUED.
Apr 1 2012	Record returned to U.S.D.C. for Eastern District of Pennsylvania.
May 11 2012	Record returned to U.S.C.A. for Third Circuit.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

NO. 11-38 JUL 5 - 2011

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IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, et. al.,
Petitioners,

v.

JAMES LAMBERT,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTION PRESENTED

James Lambert was convicted in 1984 of killing two men during the robbery of a Philadelphia bar. Years later, his lawyers unlawfully obtained the internal police file; in that file was a short, unattributed note that two eyewitnesses had been shown a photo of someone named "Lawrence Woodlock" after one of the robbers, a man with a long history of robbery convictions, had described him as a "co-defendant" – the note does not say in *what robbery* Woodlock was supposedly involved. The witnesses did not recognize Woodlock's picture, and his name appears nowhere else in the record.

The state courts rejected Lambert's claim that this note should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963), holding that the note was ambiguous and would have made no difference anyway. The Third Circuit held that decision to be "unreasonable" and ordered a new trial.

Did the Third Circuit fail to properly apply the habeas deference standard to the state court's rejection of Lambert's Brady claim, by failing to consider the state court's conclusion that the disputed evidence was ambiguous, and by engaging in an aggressively one-sided re-weighing of the facts?

LIST OF PARTIES

Petitioners:

Jeffrey Beard, Commissioner, Pennsylvania Department of Corrections

William Strickman III, Superintendent of the State Correctional Institution at Greene, Pennsylvania

The District Attorney of the County of Philadelphia, Pennsylvania

The Attorney General of the Commonwealth of Pennsylvania

Respondent:

James Lambert

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Third Circuit dated February 7, 2011, reversing the order of the district court, is reported at 633 F.3d 126, and is reprinted at App. 6-27. Relevant portions of the district court's opinion and order dated July 24, 2007, denying the petition for writ of habeas corpus, are reprinted at App. 32-36. The decision of the Pennsylvania Supreme Court, dated October 18, 2005, rejecting (*inter alia*) the claim on which the Third Circuit granted relief, is reported at 884 A.2d 848, and relevant portions are reprinted at App.40-48.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit granting Lambert a new trial based his claim under Brady v. Maryland. Rehearing was timely sought of this order, which was denied on March 7, 2011. App. 30-31. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On the evening of September 23, 1982, James Lambert and his co-defendant, Bruce Reese, entered Prince's Lounge, a bar in Philadelphia. Both men were armed; their intention was to rob the bar at gunpoint, while a third co-conspirator, Bernard Jackson, waited outside in a car. Reese stood just inside the door, atop two stairs, while Lambert entered, walked inside, and pointed his gun in the face of a barmaid named Janet Ryan.

Ms. Ryan screamed, dropped to the ground, and crawled to the bathroom. Reese ordered the other barmaid on duty, Sarah Clark, to "get the money." As she began to empty the cash register, two customers – James Graves and James Huntley – attempted to stop the robbery. Lambert shot and killed both men, and the gunmen fled into the waiting car. See generally Commonwealth v. Lambert, 603 A.2d 568, 571 (Pa. 1992) ("Lambert I").

The murders went unsolved for several weeks, until Bernard Jackson was arrested for an unrelated robbery. On October 14, 1982, Jackson told detectives that he had been the driver of the getaway car in the robbery of Prince's Lounge, and that Lambert (Jackson referred to him in this first statement as "the dude") and Jackson's brother-in-law Reese had been the men inside the bar. Eight days later, on October 22, 1982, Jackson for the first time identified "the dude" as "Monk," which is Lambert's nickname. App. 47-48 & n.4. During that same statement, Jackson explained to detectives that the .38 caliber gun used in the fatal robbery at Prince's Lounge had been obtained in a prior robbery by Jackson, Reese, and a different man, known to Jackson only as "Weasel." In fact, during that statement of October 22, 1982, Jackson confessed to having participated in about a dozen other bar robberies, not only with "Weasel" and

Reese, but with other men nicknamed "Antman," and "Underdog."[1]

Three days after this statement – where Jackson identified Lambert by his nickname as a gunman in *this* robbery, and confessed to a host of *other* robberies that did not involve Lambert – there appears an unattributed entry in the "police activity sheet," a brief written record of developments in the investigation. This note indicates that Jackson named "Lawrence Woodlock" as a "co-defendant;" the note also states that a photo of "Woodlock" was shown to two witnesses, who did not recognize him as a participant in the this robbery. App. 16, 47; *Third Circuit Appendix* at 3334. That is the only time the name of "Lawrence Woodlock" appears in the entire police file or anywhere else in the record. The note does not explain what case "Woodlock" was a "co-defendant" in; the most obvious explanation is that Jackson identified him as a participant in one of the *other* dozen or so robberies to which he had just confessed. Perhaps

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[1] As the Pennsylvania Supreme Court explained on direct appeal, Jackson told police about a "string of robberies ... [s]ome were committed by Reese alone; some by Jackson alone; some by Jackson and Reese with third parties, and indeed, some by Jackson and Reese alone." Lambert I, 603 A.2d at 574.

"Lawrence Woodlock" was the real name of "Weasel" or "Antman" or "Underdog." That would explain why the witnesses to *this* shooting did not recognize him, and why the police did not ask Jackson more questions about "Woodlock" or pursue the matter further.

Lambert and Reese were tried together for the murders. Bernard Jackson testified that Reese and Lambert had committed the fatal robbery, and that while he did not see who did the shooting, the co-defendants later told him that Lambert fired the fatal shots. Jackson was vigorously cross-examined by both defense counsel, who challenged inconsistencies in his statements to police, as well as his motives, his lengthy prior record, and his hope to curry favor with the prosecution by testifying. This was difficult and intense testimony, but ultimately the jury found it to be credible.

Meanwhile, none of the witnesses inside the bar were able to identify Lambert until Janet Ryan took the stand. Ms. Ryan – who had earlier been shown photo arrays without success – became upset during her relatively brief testimony during the Commonwealth's case-in-chief. Afterwards, she told the prosecutor that she had recognized one of the co-defendants as the man who had pointed a gun at her. The trial court turned down the Commonwealth's request to recall Ms. Ryan, but

later, counsel for co-defendant Reese called her back to the stand. This time, Ms. Ryan testified that Lambert was the man who pointed a gun in her face; other eyewitness testimony established that the man who threatened Ms. Ryan was the same man who killed both bystanders. Lambert I, 603 A.2d at 571.

On April 25, 1984, the jury convicted Lambert on two counts of first-degree murder, and related charges. The penalty hearing followed; Lambert did not testify, and he instructed his lawyer not to offer evidence or argument on his behalf. The jury returned the death penalty for both murders.

There followed many years of appeals and collateral litigation in state court. After the trial court denied post-sentence motions, the Pennsylvania Supreme Court affirmed on direct appeal in 1992. Lambert I. Next, Lambert filed a petition for state collateral relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), which the state trial court denied on January 29, 1998. The Pennsylvania Supreme Court affirmed the denial of PCRA relief. Commonwealth v. Lambert, 797 A.2d 232 (Pa. 2001).

A few months later, the police investigatory file – along with the internal police files in approximately 25 other Philadelphia capital cases

– was unlawfully seized by the Federal Capital Habeas Corpus Unit of the Federal Defender Association of Philadelphia. Between June and October 2001, the Federal Defender subpoenaed these files directly from the City Archivist "apparently in an effort to circumvent [state] discovery requirements." App. 41. When the Commonwealth complained, the Supervising Judge of the Philadelphia Court of Common Pleas, Criminal Division, ordered that all of these files be sealed; later, the court "concluded that the Federal Defenders' actions constituted an abuse of the subpoena power ... [and] referred the matter to the Pennsylvania Disciplinary Board for appropriate action." Id.

Lambert's then-current attorney, who had been assisted by the Federal Defenders in connection with Lambert's first PCRA, soon filed a second state collateral petition. He alleged that he had learned from the Defenders that Lambert's police file "contained unspecified Brady material." App. 42. Lambert said he did not know what this "Brady material" might be, because the police file had been sealed by court order. This did not prove to be much of an obstacle: Lambert's lawyer later approached the PCRA judge, *ex parte*, and presented him with a proposed order directing the Federal Defenders to give him the file, evidently without bothering to remind the judge that the court's supervising judge specifically ordered the

file sealed. The PCRA judge signed the order. App. 42-43.

Having successfully violated state discovery rules and the order of the Supervising Judge, Lambert's lawyers scoured the police file, and declared that several of documents should have been turned over to the defense before trial but were not. One of these disputed documents was the "police activity sheet" described above, from October 25, 1982. The PCRA court denied this claim (along with several others) without a hearing by order dated December 11, 2003, concluding that there was no reasonable likelihood the disclosure of this document would have changed the verdict. App. 47. The Pennsylvania Supreme Court affirmed, explaining that (1) the meaning of the note "is purely speculative at best;" (2) the rest of the record suggests that police did *not* have any reason to suspect that someone named "Lawrence Woodlock" was involved in the Prince's Lounge shootings, because this name is nowhere else mentioned, by Bernard Jackson, the police, or anyone else; and (3) given the extensive cross-examination by both defense counsel, "any additional impeachment of Jackson arising from a police notation would have been cumulative." App. 47-48. (The Court rejected five other Brady claims as meritless, and one as untimely.)

Lambert filed a *Petition for Writ of Habeas Corpus* in federal court containing *twenty four* claims of error, including the Brady/police activity sheet claim. The district court (Baylson, J.) denied all relief on July 24, 2007. With respect to the claim at issue here,[2] the court first noted that the AEDPA deference standard applied because state courts had rejected this claim on the merits. The court went on to agree with the state supreme court that the activity sheet was "entirely ambiguous, and would have required the state courts to speculate to conclude they were favorable for Lambert and material to his guilt or punishment." App. 36. The district court also noted that Lambert's Brady claims "clearly were part of the preliminary stages of the police investigation," and there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Id. (quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)).[3]

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[2] The district court's thorough opinion is more than 100 pages long, and considers all of Lambert's two dozen claims. Included in this appendix is that portion of the opinion relevant to the Brady claim on which the Third Circuit ultimately granted relief.

[3] The district court denied a certificate of appealability on this claim (the court granted a certificate for two other, non-Brady claims). The Third Circuit, however, granted a

(continued ...)

Things changed, drastically, in the Court of Appeals. At the start of the Commonwealth's oral argument (after hundreds of pages of briefing), the panel suggested that the government should not have sought a first degree murder conviction based on the testimony of Bernard Jackson. When the Commonwealth's attorney began to address the Brady claim (one of eight claims raised by Lambert on appeal), the panel impatiently told him to move on without much discussion. A few weeks later, the panel issued its extraordinary first decision in the case, a two-page order stating (without explanation) its intention to grant Lambert a new sentencing hearing on an entirely *different* claim, under Mills v. Maryland, 486 U.S. 367 (1988). App. 1-3. The panel did not say *why* that claim had merit, or attempt to distinguish this Court's recent opinion in Smith v. Spisak, 130 S. Ct. 676 (2010), which involved a very similar Mills claim. The panel stated that such detail would come later, but first Lambert must be released from death row as soon as possible. The panel also suggested that a later opinion might become unnecessary if "there is a prior disposition of the case." App. 2. This two-page order was classified as a *precedential opinion*.

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certificate of appealability on six additional issues, including this one. App. 11.

The Commonwealth sought rehearing. In the meantime, at the direction of the panel, the Third Circuit mediator contacted the parties for purposes of determining whether the Commonwealth had either complied with the panel's "immediate release" order, or considered the panel's suggestion that the case be resolved out-of-court.

The Commonwealth declined the mediator's invitation to negotiate this double murder conviction downward. Habeas matters are explicitly exempted from local federal appellate mediation (3d Cir. LAR 33.2), because state court convictions are presumed valid, federal courts can only order relief upon finding a federal constitutional violation, and because any "settlement" would necessarily include an admission by the government that the Constitution had been violated, despite the contrary conclusions of the state courts. These presumptively valid judgments are not generally amenable to horse-trading.[4]

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[4] As for the panel's immediate release order: it is the policy of the Pennsylvania Department of Corrections to keep prisoners on death row who are facing possible re-sentencing. Lambert did not challenge that policy, and the Commonwealth informed the mediator that the Department of Corrections was not prepared to abandon a policy that had not even been challenged, let alone held unconstitutional.

About two months later, the panel vacated its earlier two-page decision, but issued a new opinion, this time granting Lambert a new trial. The panel reached only one issue: the Brady/police activity sheet claim. In analyzing this claim, the panel did not mention that the police files had been improperly seized; nor did the panel even acknowledge the *possibility* that the activity sheet notation was ambiguous. Rather, the Court of Appeals simply asserted that the activity sheet "should have been disclosed," and further asserted – incorrectly – that the Commonwealth conceded this point at oral argument. That is not true; the Commonwealth "conceded" only that the *present office policy* is to disclose all police activity sheets. *Third Circuit Oral Argument Audio File*, Part I, at 41:00-41:25. That is not because such disclosure is always legally required, but in an abundance of caution and to prevent speculative post-trial Brady claims like this one.

Having assumed that the Commonwealth had violated its obligation to disclose the police activity sheet, the panel turned to the question of materiality. The state supreme court had stated (among other things) that the police activity sheet was "cumulative" of other evidence; the panel interpreted this phrase as literally as possible, concluding that the state court had improperly held that once a witness is impeached "in one

manner," the absence of additional cross-examination can never be prejudicial.[5] But the Pennsylvania Supreme Court had neither announced nor recognized such a patently foolish rule. Rather, the Court had simply explained that Lambert was not prejudiced by the absence of "cumulative" evidence, meaning evidence that would likely not have added enough to change the outcome. Meanwhile, the Third Circuit said nothing about the state court's *other* holding – that the meaning of the note was "speculative" and the full record suggested that no one named "Lawrence Woodlock" had ever been named as a co-conspirator in *this* case.

The most remarkable thing about the panel's opinion, however, is its palpable disdain for the conviction, and its aggressive and misleading recharacterization of the facts. Indeed, the panel made several obvious factual errors that are critical to the materiality analysis. First, in its attempt to portray Bernard Jackson as a hopeless liar, the panel actually referred to an earlier inconsistent statement by Jackson to police *that*

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[5] The panel's exact language was, "it is patently unreasonable to presume – without explanation – that whenever a witness is impeached in one manner, any other impeachment becomes immaterial." App. 22. That is not a fair reading of the state supreme court's opinion.

does not exist. The panel insisted that Jackson told police "that Reese had admitted to shooting two people," App. 15, but that is not true. Jackson *never* told police that Reese was the shooter, and the panel's citation for this proposition does not reveal any such statement. Indeed, despite the acid rhetoric of the panel, Jackson's statements to police were remarkably consistent on the core issues, once he admitted that it was Reese, not Lambert, who did the talking once the men re-entered the car.[6]

The panel also omitted some basic, important facts – crucial to any honest accounting

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[6] Jackson at first told police that *Lambert* had done the talking once the men returned to the car; this was apparently a rather weak, short-lived attempt to protect Reese, Jackson's brother-in-law. In all subsequent statements, Jackson admitted that *Reese* had been the one to reveal that two people had been killed, and that *Reese* later disclosed that Lambert had done the shooting.

The panel's citation for Jackson's non-existent earlier statement is actually a citation to his trial testimony, in which defense counsel pounced on a perceived ambiguity in Jackson's use of pronouns at trial – did his use of "he" or "we" refer to *Reese* or *Lambert* firing the fatal shots? *Third Circuit Appendix* at 2002. Jackson denied any ambiguity, and that if he (Jackson) had implied by his use of pronouns that Reese had admitted the shooting, it was a simple slip of the tongue.

of this case. The panel did not mention, for example, that Lambert had *admitted* to being with Reese and Jackson that night; Lambert weakly told police that he had been dropped off nearby just before the fatal robbery, and that Reese and Jackson picked him up again afterwards. The prosecution did not use this statement, but surely would have, if the defense had attempted to pin this crime on someone named "Lawrence Woodlock." *Third Circuit Appendix* at 2956-57. As for the eyewitness who *identified Lambert as the shooter*, Ms. Ryan, the panel simply dismisses her testimony as "bizarre" and unworthy of further consideration. App. 26-27. But that is not a federal habeas court's call to make; the jury obviously found her credible, and the judges of the Court of Appeals were not in the courtroom when Ms. Ryan dramatically identified Lambert more than a quarter-century ago.

Other disturbing mistakes revealed the depth of the Third Circuit's failure to appreciate the facts or the proper role of federal courts in reviewing state convictions. For example, the panel did not reveal that the two eyewitnesses who were shown a picture of "Lawrence Woodlock" did not recognize him – suggesting yet again that "Woodlock" had nothing to do with this case. On the other hand, the panel *did* gratuitously note that Lambert obtained a statement from Jackson after trial, in which Jackson insisted that the

witness Janet Ryan was biased because she was a friend of Reese's family "and would never testify against Reese." App. 27. The panel mused that Jackson made this accusation "perhaps ... [because] Jackson saw the havoc his testimony had wrought." Id. Or, perhaps Jackson made this up at Lambert's request; at trial, Janet Ryan denied knowing Reese, another fact that the panel does not mention. See *Third Circuit Appendix* at 2823 ("Q: Do you know [Reese's wife and mother]? A (Ms. Ryan): No.")[7] In any event, the panel does not explain why it is inclined to accept the truth of Jackson's unsworn, contradicted, belated post-trial statement, while simultaneously rejecting his actual trial testimony out-of-hand.

The point is, the panel's recharacterization of the facts does not inspire confidence, and does

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[7] Not only does Jackson's post-trial statement rehash an allegation that Ms. Ryan refuted at trial, it was unsworn, another fact that the panel omitted. Rather, the Third Circuit described Jackson's post-trial statement as an "affidavit" that the state courts rejected because it was "untimely and not in proper form." App. 27. This is a misleading piece of advocacy, calculated to create the impression that the state court's rejection of this statement was hyper-technical. In fact, the state courts have no obligation – legally or morally – to accept unsworn post-trial statements by co-conspirators that are contradicted by trial evidence and presented contrary to state rules.

not remotely resemble the kind of deferential review required by the habeas statute. The panel's admonition that "[o]ne wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson," App. 15, given its own selective re-writing of the record, is simply outrageous.

Finally, the panel announced that the Commonwealth must retry Lambert "within 120 days of this opinion." App. 8. A few days ago, the panel granted only a short additional extension; the deadline now falls 30 days after this *Petition for Writ of Certiorari* is decided. In the meantime, the Commonwealth has been forced to pursue this case simultaneously in both state and federal court, preparing for retrial while also pursuing its right to review.

REASONS FOR GRANTING THE WRIT

This case is about the proper application of the habeas deference standard to claims of withheld evidence under Brady v. Maryland. Such claims are common in federal habeas review; courts must tread carefully, given the ease with which such accusations are made years after trial, the amount of speculation involved, and the potential harm these claims pose to the finality of old convictions and the reputation of the local

prosecutor. While this Court has repeatedly applied the deference standard to other types of claims – especially ineffectiveness issues – the Court has not yet applied deference review to a habeas Brady claim.

The particulars of this case demonstrate the need for this Court's guidance. Twenty-seven years after James Lambert was convicted of two first-degree murders in a Pennsylvania state court, the Third Circuit granted him a new trial on a Brady claim. Although the state courts had rejected this claim as speculative and immaterial, the Court of Appeals did not defer: indeed, the panel *assumed* that the disputed document should have been disclosed, and aggressively re-evaluated the facts to find that the omission was material. Along the way, the panel mischaracterized the evidence, made its own credibility determinations, ignored arguments relied upon by the state supreme court, and even scolded the Commonwealth for prosecuting Lambert in the first place. Although the panel paid lip service to the AEDPA deference standard, there is no actual deference in this opinion.

The Court of Appeals' failure to properly apply the deference standard is, unfortunately, not a surprise. Over the past decade, the Third Circuit has routinely granted relief in Pennsylvania death penalty cases – the only three prisoners to be

executed post-Furman have been volunteers, and even that has not happened since 1999. In the process, the Third Circuit has overlooked almost every procedural bar, second-guessed counsel, and engaged in wide-ranging *de novo* review.[8] Indeed,

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[8] Just in the *last three years* the Third Circuit has set aside state judgments in the following Pennsylvania death penalty cases: Kindler v. Horn, ---F.3d ---, 2011 WL 1602083 (3d Cir., April 29, 2011) (granting new penalty phase); Abu-Jamal v. Sec'y, Pennsylvania Dep't of Corrections, --- F.3d ---, 2011 WL 1549231 (3d Cir., April 26, 2011) (new penalty phase); Breakiron v. Horn, --- F.3d ---, 2011 WL 1458795 (3d Cir., April 18, 2011) (new trial on remaining conviction); Rollins v. Horn, 386 Fed. Appx. 267 (3d Cir. 2010) (new penalty phase), cert. denied, 131 S. Ct. 2143 (2011); Wilson v. Beard, 589 F.3d 651 (3d Cir. 2009) (new trial); Simmons v. Beard, 590 F.3d 223 (3d Cir. 2009) (new trial), cert. dismissed, 130 S. Ct. 1574 (2010); Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009), cert. denied, 130 S. Ct. 1879 (2010) (new penalty phase); Hardcastle v. Horn, 332 Fed. Appx. 764 (3d Cir. 2009) (new trial); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (new penalty phase), cert. denied, 130 S. Ct. 58 (2009); Holland v. Horn, 519 F.3d 107 (3d Cir.) (new penalty phase), cert. denied, 129 S. Ct. 571 (2008). In several other cases, the Third Circuit did not grant the writ outright, but remanded for further proceedings. Lark v. Sec'y, Dep't of Corrections, --- F.3d ---, 2011 WL 2409297 (3d Cir. June 16, 2011) (remanded for further proceedings on jury discrimination claim); Morris v. Beard, 633 F.3d 185 (3d Cir., Jan.26, 2011) (remanded for further proceedings on "conflict of interest" claim); Saranchak v. Beard, 616 F.3d 292 (3d Cir. 2010) (remanded for consideration of "remaining issues"), petition for cert. filed, No. 10-10114 (April 15, 2011, U.S.); Lewis v. Horn, 2009 WL 2914433 (3d Cir. 2009) (remanded for

(continued ...)

a few weeks ago the Third Circuit renewed two orders of habeas relief in Philadelphia capital cases, even after its earlier grants of relief were *reversed* by this Court and returned for further consideration. See Abu-Jamal v. Sec'y, Pennsylvania Dep't of Corrections, --- F.3d ---, 2011 WL 1549231 (3d Cir., April 26, 2011); Kindler v. Horn, ---F.3d ---, 2011 WL 1602083 (3d Cir., April 29, 2011).[9] The Third Circuit's determination to grant relief in Pennsylvania capital cases has not escaped the notice of the state supreme court. See, e.g., Commonwealth v. Bracey, 986 A.2d 128, 137 (Pa. 2009) ("it has been decades since the federal courts have upheld a sentence of death with respect to any Philadelphia prisoner who did not

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ineffectiveness hearing); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008) (remanded on "remaining sentencing phase issues").

In only two cases since the Pennsylvania death penalty statute was enacted 30 years ago has the Third Circuit denied all relief in a contested Pennsylvania capital case. The petitioner in Hackett v. Price, 381 F.3d 281 (3d Cir. 2004), cert. denied, 125 S. Ct. 2514 (2005), is currently litigating another state post-conviction petition; and in Williams v. Beard, 637 F.3d 195 (3d Cir., Mar. 9, 2011), the *Petition for Rehearing* has yet to be filed after several extensions of time.

[9] The Commonwealth is seeking *certiorari* in both Abu-Jamal and Kindler; the petitions will be filed within the next few days.

consent to be executed"). See also Commonwealth v. Spotz, 18 A.3d 244, 349 (Pa., April 29, 2011) (Castille, C.J., with McCaffery, J., concurring) ("[w]hen the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court").

Several of these recent grants of relief were based on perceived violations of Brady; indeed, this is the *fourth* recent Third Circuit decision in the past two years to grant habeas relief to Pennsylvania death-sentenced prisoners on Brady grounds.[10] Such results have become common in other Circuits as well.[11] This case, however, is particularly disturbing, because the result here is so disrespectful to the state in its one-sided re-evaluation of the facts – a re-evaluation that is largely garbled, mistaken, and incomplete, and certainly calculated to put the prosecution in the worst possible light. The Third Circuit's

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[10] See Breakiron, 2011 WL 1458795; Wilson, 589 F.3d 651; Simmons, 590 F.3d 223.

[11] See, e.g., Robinson v. Mills, 592 F.3d 730, 734-38 (6th Cir. 2010); Maxwell v. Roe, 628 F.3d 486, 508-13 (9th Cir. 2010), petition for cert filed, No. 10-1548 (U.S., June 21, 1011); Valdorinos v. McGrath, 598 F.3d 568 (9th Cir. 2010), rev'd for further consideration in light of Harrington, 131 S. Ct. 1042 (2011).

infringement on state criminal judgments has reached a new level here, and this Court's review is warranted.

A. AEDPA requires that federal courts defer to reasonable state court decisions, and because Brady is a general rule applied to many different factual situations, the scope of deference is broad.

In Brady, this Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment." 527 U.S. at 280. The Court has further defined this right in succeeding cases, to make clear (among other things) that the prosecution's obligation extends to favorable evidence that is not specifically requested by the defense. See United States v. Agurs, 427 U.S. 97, 103-104 (1976).

But this Court has also explained that the existence of a Brady violation depends on two related, highly factual inquiries: whether the evidence was actually favorable to the defense, and especially, whether it was reasonably likely to have changed the outcome of the trial. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). This materiality standard is the same as the familiar prejudice standard governing ineffectiveness

claims. United States v. Bagley, 473 U.S. 667, 681-82 (1985), cited in Kyles v. Whitley, 514 U.S. 419, 434 (1995). The Court has repeatedly explained that the proper application of this standard requires the reviewing court to reduce the distorting effects of hindsight as much as possible. To do that, the reviewing court must consider *all* the circumstances, even those possibilities that are not immediately apparent in the record. For example: is there a reasonable contrary argument that the disputed evidence was *not* favorable? Or, what would have happened if this evidence had been disclosed and introduced? Would the prosecution have had possible rebuttal evidence? In answering these questions, just as in the ineffectiveness context, the burden for establishing materiality ultimately rests on the claimant. Strickler 527 U.S. at 282. If there are gaps in the record, or if some factual issues call for speculation, any doubts must be resolved in favor of the judgment. Otherwise, the finality of old convictions would be subject to endless attack by unprovable, speculative allegations.

Brady materiality, like Strickland prejudice, is thus a significant standard that must be applied with care. The standard is doubly difficult where, as here, the deferential AEDPA standard applies. Under the current habeas statute, relief may not be granted unless the state court's adjudication of the claim was "contrary to" federal law as clearly

established by the holdings of this Court, or the state decision "involved an unreasonable application of" such law. 28 U.S.C. sec. 2254(d)(1); Harrington v. Richter, 131 S. Ct. 770, 783-84 (2011). Even "a strong case for relief" is not enough; the state prisoner must demonstrate that the state decision was so utterly lacking in justification, "there was error ... beyond any possibility for fair-minded disagreement." Id., 131 S. Ct. at 786-87.

That is a difficult showing for any kind of claim, but especially for general rules like the Brady materiality standard and its twin, the Strickland prejudice standard. These rules give courts considerable leeway in application case-by-case. That means there are a greater number of reasonable outcomes, and it is correspondingly more difficult to establish that the state court's decision fell outside the wide range of acceptable conclusions. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004), quoted in Harrington, 131 S. Ct. at 786.

Before relief may properly be granted under the deference standard in such a case, the federal court must observe certain basic steps. The court must at least *consider* arguments relied on by the state courts, and must consider other reasonable arguments as well. Harrington, 131 S. Ct. at 786 ("a habeas court must [first] determine what

arguments or theories ... could have supporte[d] the state court's decision"). The court must consider *all* of the relevant evidence and circumstances, including evidence that could have been admitted to rebut the claimant's new arguments. Bagley, 473 U.S. at 683 (court reviewing Brady claim must consider "totality of the circumstances"); Wong v. Belmontes, 130 S. Ct. 383, 386 (2009) (per curiam) (proper application of prejudice standard includes anticipation of *other* evidence that might have been introduced in rebuttal). And the federal court must avoid, to the extent possible, making credibility determinations and other matter-of-opinion assessments, with which a different factfinder might disagree. Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (habeas statute "gives federal habeas courts no license to redetermine credibility"). This is true not only because the federal habeas court lacks first-hand exposure to the witnesses at trial, but also because the state court judgment under review rests on factual findings *already made* by the state factfinder. The presumption must be that the state factual findings – whether made by a state court judge, or jury; and whether explicit or implicit – were sound.

This Court has not yet applied these standards in the Brady context, perhaps because such claims are often intensely case-specific and factual. Review of this case, however, does not

require over-involvement with the record – because the basic questions are sharply posed and apparent from any reasonable review of the opinion below.

B. The Court of Appeals failed to defer to the state court's rejection of Lambert's Brady claim.

1. The Third Circuit did not consider contrary arguments relied upon by the state supreme court.

Perhaps most obviously, the Third Circuit failed to *consider* the possibility that the disputed evidence was ambiguous, and not even helpful to Lambert's case. The Commonwealth witness Bernard Jackson confessed to about one dozen armed robberies *other* than this one; the police "activity sheet," improperly seized from internal police files, contains only a brief, unexplained notation that Jackson identified someone named "Lawrence Woodlock" as a "co-defendant." Jackson may well have meant that "Woodlock" was a cohort in one of his *other* robberies, which would explain why the witnesses in this case did not recognize "Woodlock's" photo, why Jackson did not name "Woodlock" in any of his actual statements to police about *this* case, and why "Woodlock's" name never came up again.

The Pennsylvania Supreme Court held that the meaning of the "Woodlock" reference was

"purely speculative at best," and the notion that police had reason to suspect "Woodlock" is at odds with the rest of the record. App. 47. That is a reasonable interpretation of the matter; at the very least, the Third Circuit should have *considered* this argument. But the panel did not even mention the point, and even engaged in some misleading editing to pretend the state supreme court never made these observations.[12]

Instead, the panel focused on the Pennsylvania Supreme Court's other holding, that the police activity sheet was not material because it was "cumulative" of other evidence. The panel narrowly interpreted this as an inflexible rule that "whenever a witness is impeached in one manner, any other impeachment becomes immaterial." App. 22. The state court did not announce any such rule. As the state supreme court saw it, Bernard Jackson was so thoroughly impeached that "any additional impeachment ... from a police notation would have been cumulative." App. 48. The Pennsylvania Supreme Court here used the

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[12] The panel quotes only the *second half* of the critical paragraph from the state court opinion, leaving out the Pennsylvania Supreme Court's observations concerning the "speculative" nature of Lambert's argument. Compare App. 17-18 (Third Circuit opinion) with App. 47-48 (state supreme court opinion).

term "cumulative" to mean, simply, that additional cross-examination on this ambiguous point would not have changed anything. That is again a reasonable holding. This Court has made it clear that in habeas matters, state court opinions must be read to avoid any unnecessary state/federal conflict, and to give state courts the "benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam). The Third Circuit did the opposite here, interpreting the state court's innocuous language to create a phantom, irrational error. This, too, is an important and harmful mistake.

2. The Court of Appeals omitted important facts, and invented others.

In addition to mischaracterizing the opinion of the Pennsylvania Supreme Court, the Court of Appeals aggressively re-engaged the factual record, making a number of plain mistakes in the process. First, in its haste to portray Bernard Jackson's trial testimony as unbelievable, the panel actually invented an inconsistent pre-trial statement that Jackson never made. According to the panel, Jackson first told police that Reese, not Lambert, did the shooting. Jackson said no such thing. He never identified Reese as the shooter; the only inconsistency was *who did the talking* when Reese and Lambert re-entered the car.

The Court of Appeals also did not mention that Lambert *confessed* to police that he was with Reese and Jackson on the night of the murders. (He said Reese and Jackson dropped him off before the crime, and picked him up afterwards; this is not an especially believable story, and the trial court called it "very incriminating" because it placed Lambert in the presence of his co-conspirators. *Third Circuit Appendix* at 2956-57.) The prosecution did not introduce Lambert's statement at trial, but if Lambert had tried to blame this crime on someone named "Lawrence Woodlock," the prosecution could surely have used his statement as rebuttal. This is an important part of the materiality analysis, which the Court of Appeals entirely skipped. See Wood v. Bartholomew, 516 U.S. 1 (1995) (government's failure to disclose polygraph not material where, among other things, prosecution could have introduced in rebuttal that defendant had confessed to a cellmate). Nor did the panel acknowledge that the two witnesses who were shown "Woodlock's" photo did not recognize it, which again is critical to any fair assessment of the importance of this evidence.

The panel's remarkable tone – its suggestion that Lambert may well be innocent, that the government may have been wrong to prosecute these charges at all – might also have been

tempered with a mention of Lambert's partial confession.[13]

3. The Court of Appeals improperly made credibility determinations, substituting its own reading of the record for the findings of the jury and the conclusions of the state courts.

While federal courts reviewing state convictions must steer clear of credibility disputes to the extent possible, the Third Circuit here did the opposite, eagerly characterizing evidence it never heard, as part of its materiality analysis.

The panel quickly dismissed the dramatic testimony of Janet Ryan – the barmaid who actually identified Lambert – as "bizarre," and gave it no weight at all. App. 26-27. If by "bizarre" the panel meant "unusual" – Ms. Ryan had been unable to identify Lambert before trial, but was able to do so when finally faced with him, after becoming visibly upset on the stand and confiding to the prosecutor that she recognized the man who

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[13] The Third Circuit could also have noted that when the police finally located Lambert (after many weeks of visiting various addresses and family members, without success, and without Lambert volunteering himself), he gave them a false i.d. and a false name. *Third Circuit Appendix* at 465. This is classic consciousness-of-guilt evidence, but again the court below overlooked it.

pointed a gun in her face – that was an overstatement. First-time courtroom identifications do happen, and witnesses to violent crimes often react emotionally. The reliability of Ms. Ryan's testimony was for the jury to decide.

The Third Circuit even purported to describe the *tone* of Bernard Jackson's testimony, which took place in a Philadelphia courtroom almost 30 years ago. The panel described the end of this testimony as "breathtaking" because Jackson "somewhat proudly" asserted that his story had been mostly consistent. App. 16. In fact, Jackson's "proud" boasts consisted of *one word answers* to the prosecutor's questions; there is no way to tell, now, whether these answers were particularly "proud" or "humble" or anything else.[14]

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[14] The supposedly "breathtaking" and "proud" climactic testimony of Bernard Jackson is as follows:

> Q: Did you ever say that there were two other people involved in this job with you ... other than [Reese and Lambert]?
>
> A: No.
>
> Q: Did you ever say that there was anything other than a .32 and a .38 caliber gun involved?
>
> A. No.

(continued ...)

Having characterized the evidence against Lambert as "bizarre" and "breathtaking," the panel turned around and proclaimed that the evidence is "quite strong" that Bruce Reese, not Lambert, was the shooter. App. 26. This is puzzling. While there is *direct eyewitness testimony* and the statements of a co-conspirator proving that *Lambert* was the shooter, the only possible evidence that *Reese* was the shooter is (1) the testimony of Bernard Jackson that Reese carried the murder weapon and gave Lambert a different gun before they entered the bar, and (2) the barmaids' estimation of the shooter's height. As for Jackson's testimony, the panel does not explain why it is willing to accept *this* portion of Jackson's account, while rejecting *all the rest of it*; nor does the panel say why it is so hard to believe that the men switched guns at some point (or perhaps Jackson was simply mistaken about who carried

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* * *

> Q: ... Did you ever not say that you were the getaway driver in this particular case and that those two went in the bar?
>
> A: No.

(*Third Circuit Appendix* at 2275-76.)

which gun). Further, the eyewitnesses gave widely varying accounts of the gunmen's height, which add up to "strong" evidence of nothing. Compare, e.g., Testimony of Janet Ryan (shooter was about 5'6", other gunman was 5'4"), with Testimony of Richard DeLoatch (shooter was about 5'10", other gunman was 5'9" or 5'10).[15]

But the panel never faced the most obvious problem for Lambert: the jury heard the testimony of Bernard Jackson, subject to grueling cross-examination, *and believed him*; the jury also heard the testimony of Janet Ryan, the barmaid who identified Lambert as the shooter, *and believed her*. Even without deference to the state court decisions, surely the jury's assessment of credibility deserves more respect.

Finally, the panel's lopsided review of the record was matched by its own heavy-handed treatment of the case. The Court of Appeals first granted penalty phase relief on an entirely different claim, without a reasoned opinion, and with an order to immediately change Lambert's conditions of confinement. When the Commonwealth protested that the relevant policy of the Department of Corrections had not even

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[15] *Third Circuit Appendix* at 1929-30 and 1957-58, respectively.

been *challenged* – and when the Commonwealth did not accept the panel's invitation to negotiate the case away – the Court of Appeals vacated its opinion and issued a new one, this time granting *more* relief (a new trial). The panel suggested that the government should not have undertaken this prosecution in the first place ("One wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson"), did not even mention that the disputed evidence had been improperly seized from police files, let alone that Lambert had given police a largely inculpatory statement, and set an abbreviated conditional deadline of 120 days "from the date of this Opinion," App. 8. The panel declined the Commonwealth's request to stay the deadline pending this *Petition*, instead re-setting the date at 30 days from this Court's resolution of the case. As a result, the Commonwealth must simultaneously prepare this 28-year-old case for retrial while filing this *Petition*; the state courts are grappling to move the case forward while the official state record is still in federal court.

With respect, the Third Circuit's handling of this case does not reflect the required deference owed to state court judgments or to state criminal justice processes. Federal review of decades-old state court convictions, violent crimes with real victims, real witnesses, and real court proceedings that are now reduced to a cold record, must be

undertaken with sensitivity and humility. The proper standards must be applied.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-9005

JAMES LAMBERT,
Appellant

v.

JEFFREY BEARD, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; WILLIAM STRICKMAN, III, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 02-cv-09034)
District Judge: Honorable Michael M. Baylson

ORDER

Appellant James Lambert has been under sentence of death since 1984, during which time the case has wended its way through the state and federal courts. On September 30, 2010, this Court heard argument on Lambert's appeal from the District Court's denial of his petition for habeas corpus pursuant to 28 U.S.C. § 2254, an appeal that challenges the District Court's disposition of the various contentions Lambert raised as to both his conviction for first degree murder and the sentence of death imposed thereon.

Unless there is a prior disposition of this case, an Opinion of this Court will issue in due course addressing the contentions raised to the conviction itself and whether the judgment of the District Court as to the conviction should be affirmed. This Court, however, having concluded that, whether reviewed *de novo* or under AEDPA's deferential standard of review, the District Court erred in finding that there had not been a violation of the rule of *Mills v. Maryland*, 486 U.S. 367 (1988).

IT is, therefore, on this 23rd day of November 2010

ORDERED that the sentence of death be and hereby is VACATED and, pending further order of this Court, any conditions and/or disabilities to which petitioner is being subjected because of the sentence of death, including but not limited to,

being housed other than in the general population, be lifted.

/s/ Maryanne Trump Barry
Circuit Judge

Dated: November 23, 1010
nmr/cc: Thomas W. Dolgenos, Esq.
Joshua S. Goldwert, Esq.
Stuart B. Lev, Esq.
Daniel Silverman, Esq.

App. 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-9005

JAMES LAMBERT,
Appellant

v.

JEFFREY BEARD, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; WILLIAM STRICKMAN, III, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 02-cv-09034)
District Judge: Honorable Michael M. Baylson

Argued: September 30, 2010

Before: BARRY, HARDIMAN and STAPLETON,
Circuit Judges

JUDGMENT

This cause came to be heard on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on September 30, 2010.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of the District Court dated July 24, 2007 and entered on July 25, 2007 is hereby vacated and the matter is remanded. The District Court is hereby directed to conditionally grant the petition for a writ of habeas corpus. James Lambert shall be released if the Commonwealth fails to retry him within 120 days. All in accordance with the Opinion of the Court.

For the Court,

/s/
Marcia M. Waldron, Clerk

Date: February 7, 2011

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-9005

JAMES LAMBERT,
Appellant

v.

JEFFREY BEARD, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; WILLIAM STRICKMAN, III, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 02-cv-09034)
District Judge: Honorable Michael M. Baylson

Argued: September 30, 2010

Before: BARRY, HARDIMAN and STAPLETON,
Circuit Judges

(Opinion Filed: February 7, 2011)

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OPINION OF THE COURT

BARRY, *Circuit Judge*

I. Introduction

We have approached this case with the utmost seriousness. We are humbled by the fact that over a twenty-eight-year period of time, the case has progressed through courts of the Commonwealth of Pennsylvania and the U.S. District Court without James Lambert having been granted relief. We, nonetheless, must decide this case consistent with what we believe our obligation to be, while according the utmost respect to the standard of review that we are required to apply. Having done so, we now vacate the judgment of the District Court dated July 24, 2007, and remand this matter to the District Court, which is directed to conditionally grant the petition for a writ of habeas corpus. If, within 120 days of the date of this Opinion and Order, the Commonwealth fails to retry Mr. Lambert, he shall be released.[1]

[1]Given this disposition, our order of November 23, 2010, which vacated the sentence of death given our conclusion that the jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), is now moot and will be vacated, and the

(continued...)

II. Procedural History

It is not an overstatement to say that the procedural history of this case is extensive in the extreme, as would be expected in a case that has spanned more than twenty-eight years. We have carefully examined the numerous issues Lambert has raised over these many years and how the various courts have resolved those issues. We, however, decide this case on one issue, an issue under *Brady v. Maryland*, 373 U.S. 83 (1963), and find it unnecessary to address the other issues raised to us or the issues raised to the courts that preceded us. So, too, only a summary of the procedural history that does not pertain to the *Brady* issue will suffice.

James Lambert and Bruce Reese were arrested and charged with murder, robbery, criminal conspiracy, and possession of an instrument of crime based on what the Commonwealth had been told by one Bernard Jackson, who subsequently testified for the Commonwealth in exchange for an open guilty plea to third-degree murder, robbery, conspiracy, and several unrelated crimes. On April 25, 1984, Lambert was convicted by a jury of two counts of first-degree murder as well as the other

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[1](...continued)
Commonwealth's petition for panel rehearing and rehearing en banc as to that order will be denied as moot.

crimes with which he was charged, and was sentenced to death. Reese was convicted of second-degree murder, and was sentenced to life imprisonment.

Lambert moved for a new trial and to vacate the judgment, motions which were denied. He appealed, and in a 3-2 decision with two Justices not participating, the Pennsylvania Supreme Court upheld his conviction and affirmed the sentence of death. *See Commonwealth v. Lambert*, 603 A.2d 568 (Pa. 1992) ("*Lambert I*"). Lambert next filed a *pro se* Pennsylvania Post-Conviction Relief Act ("PCRA") petition, which was amended by counsel on January 30, 1997, and twice supplemented thereafter. On January 29, 1998, the PCRA court denied the petition without a hearing. The Pennsylvania Supreme Court remanded for the PCRA court to write an opinion, which it did on March 4, 2000. Lambert again appealed, and the Pennsylvania Supreme Court affirmed in an opinion signed by two Justices, with two Justices concurring in the opinion, one concurring in the result, and two dissenting. *See Commonwealth v. Lambert*, 797 A.2d 232 (Pa. 2001) ("*Lambert II*"). Lambert then filed a second PCRA petition raising, for the first time, a claim under *Brady*, based on recently discovered exculpatory evidence. That petition was denied as well, and the Pennsylvania Supreme Court again affirmed. *See Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005) ("*Lambert III*").

In 2002, Lambert filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania raising twenty-four claims of constitutional error, most of which were accompanied by related allegations of ineffective assistance of counsel.[2] The District Court did not conduct an evidentiary hearing and denied relief on all claims, but granted a certificate of appealability ("COA") on one guilt-phase claim relating to the Commonwealth's alleged discriminatory use of peremptory challenges at jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and one sentencing-phase claim relating to whether there had been a violation of *Mills v. Maryland*, 486 U.S. 367 (1988). *See Lambert v. Beard*, No. 02-9034, 2007 WL 2173390 (E.D. Pa. July 24, 2007).

We then expanded the COA to include the following issues: (1) whether the Commonwealth's failure to disclose exculpatory evidence and misrepresentation of the bargain given to its key witness in exchange for his testimony violated *Brady*; (2) whether Lambert was denied his right to present a defense, call witnesses on his behalf, and confront the evidence against him when he was barred from introducing evidence that Jackson and Reese had a

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[2]Lambert's habeas petition was stayed pending exhaustion of the claims raised in that petition in his subsequently filed third PCRA petition.

history of committing robberies together and without him; (3) whether Lambert was denied his right to due process and a fair trial when the trial court allowed a witness called by Reese to identify Lambert for the first time in court; (4) whether Lambert was denied his right to due process when the trial court refused to sever his trial from Reese's trial; (5) whether the trial court misled the jury about the role of appellate review in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and (6) whether Lambert's penalty-phase waiver of his right to present mitigating evidence was not knowing, intelligent, and voluntary.

III. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 2241, and 2254. We have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. We exercise plenary review over the decision of the District Court, as the Court did not hold an evidentiary hearing. *See Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), where, as here, a habeas petitioner's claims were adjudicated on the merits in state court, our review is limited to determining whether the state court decision was contrary to or involved an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts in light of the evidence

presented in the state court. *See* 28 U.S.C. § 2254(d).

IV. Factual Background

At approximately 9:00 on the evening of September 23, 1982, the robbery of Prince's Lounge went bad, and two patrons were shot to death. The Philadelphia Police Department commenced an investigation, but the perpetrators could not be identified, although two of the three barmaids working that night gave general descriptions of each of the two perpetrators. Not long after the murders, however, an anonymous tip was received by the Department identifying Bernard Jackson and "Touche" (later identified as Reese, Jackson's brother-in-law) as the men in the bar that night. Each barmaid was subsequently presented, for the first time, with a photo array that included Jackson's photo. Sarah Clark identified Jackson as the man who was standing at the top of the stairs in the bar and ordered her to place the money in a bag just before she heard two gunshots from the rear of the bar, the shots that killed the two patrons. Marie Green was 85 to 90 percent sure that the man at the top of the stairs was Jackson. Janet Ryan, the third barmaid, was working at the rear of the bar and dropped down and ran to the ladies room when the shooter pointed a gun in her face.

Jackson, who by then was in custody on another charge, learned that he had been identified

by at least one of the barmaids and told the police about the Prince's Lounge robbery and that Reese and "another dude," whose name he could not recall, had done it. His story, at least initially, went as follows. He and Reese met the "other dude" (whom he much later identified as Lambert) for the first time less than an hour before the three of them decided to rob a bar. After casing, and rejecting, one bar, Jackson, who admitted to having previously committed at least thirteen armed robberies of bars, made the decision to rob the Prince's Lounge after ascertaining that a female friend of his was not working that night. Jackson claimed to have waited in the getaway car while Lambert and Reese entered the bar and went upstairs, each armed with a handgun provided by Reese -- Lambert was carrying the .32 and Reese the .38, which, as it turned out, was the murder weapon. Jackson claimed not to have known what happened in the bar aside from what he was told by Reese and Lambert when they returned to the car and fled the scene with Jackson at the wheel.

V. Discussion

It is undisputed that without Jackson's statements to the police, the Commonwealth could not have indicted Lambert on these charges. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (finding evidence impeaching witness's credibility material, in part, because without the witness's testimony, "there could have been no indictment"). Jackson,

however, came burdened with a wealth of impeachment material, not the least of which were four prior inconsistent statements to the police about who did what and who said what on the night in question, and his admitted goal of testifying to save himself from a death sentence -- "no doubt about it," he said. (A2180). Predictably, he was savaged at trial. One wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson.

But we digress.

A.

Jackson's statements of October 14, 1982, October 22, 1982, January 14, 1983, and February 6, 1983 were devastatingly inconsistent with each other and with his story at trial. He initially decided to give the police only "some of the truth" and told the police that Reese had admitted to shooting two people (A2002); then he told the police that Reese said Lambert was the shooter and that Reese was ordering the barmaid to give him the money (A2007, 2013); then he told the police that although he had previously said that Lambert had done it, *that* wasn't true -- he was "feeding them a story" when he said that Lambert said he had shot two people and "that was a lie, too." (A2080, 2082, 2100.) *Now*, at trial, he said, he was going to tell the truth. It was Reese, not Lambert, who said that he shot two people, but that wasn't true either

because what Reese *really* said was that "I think we killed a couple of guys in there," not that *he* did. (A2253.) Indeed, Jackson was finally forced to admit that three months after the first of his lengthy statements to the police, he was still giving them different versions of what had happened. Still, breathtakingly, at the very end of his testimony, with his credibility hanging, at best, by a thread, and conceding that he was testifying to avoid a death sentence, Jackson somewhat proudly announced that although he had "switched what [Lambert and Reese] did interchangeably," he *always* said that Lambert and Reese were the two men involved -- they were "the only two people" he supplied to the police. (A2266-67, 2276.)

But that was simply not so, and neither the defense nor the jury was told that it was not so. In the Police Activity Sheet of October 25, 1982, which first came to light during the PCRA proceedings, Jackson named Lawrence Woodlock as a "co-defendant." (A3334.) The Commonwealth conceded at oral argument before us that the Police Activity Sheet should have been disclosed to the defense prior to trial. Aside from the other arguments made as to why that Police Activity Sheet was significant, there can be no question that given Jackson's consistent position -- his *only* consistent position, by his own admission, not to mention the evidence at trial -- that the only participants were Lambert and Reese in the bar and Jackson in the car, the naming of another participant could well

have destroyed what little was left of his credibility.

The PCRA Court considered whether the Commonwealth's failure to disclose Jackson's statement that there was another participant -- a "co-defendant" -- was material such that, as the Supreme Court explained, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The PCRA Court denied Lambert's *Brady* claim on the merits, explaining that "[v]iewed in light of the record as a whole, the [Police Activity Sheet of October 25, 1982] is not material." (A227). It concluded that "Jackson was comprehensively impeached by the defendant and co-defendant Reese at trial," and "[d]espite being impeached on prior inconsistencies and lies to police, the jury [sic] determined Jackson to be credible." (A228.) The Pennsylvania Supreme Court agreed, explaining that the Police Activity Sheet of October 25, 1982

> would not have materially furthered the impeachment of Jackson at trial as he was already extensively impeached by both appellant and Reese. Indeed, each codefendant cross-examined Jackson on the following: every inconsistency in his four police statements; that he was testifying on behalf of the

> Commonwealth pursuant to a plea bargain; and that he had several open robbery charges still pending and his testimony was motivated by a desire to receive lenient sentences for those crimes. Any additional impeachment of Jackson arising from a police notation would have been cumulative. Accordingly, the Commonwealth did not violate *Brady* by not disclosing this police activity sheet as appellant has failed to show its materiality.

Lambert III, 884 A.2d at 855-56. The District Court did not mention the Police Activity Sheet of October 25, 1982 in its Opinion, instead treating it as just one among the host of other items the Commonwealth had not disclosed and concluding that the Pennsylvania Supreme Court's disposition of Lambert's *Brady* claim was a reasonable application of federal law. *See Lambert v. Beard*, 2007 WL 2173390, at *10.

B.

"[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (alterations and internal quotation marks omitted). Nevertheless, AEDPA created a "new, highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S.

320, 333 n.7 (1997). That statute bars a federal court from granting habeas relief unless the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[T]he cut-off date for determining 'clearly established Federal law' for purposes of § 2254(d)(1) is the date of the relevant state-court decision." *Greene v. Palakovich*, 606 F.3d 85, 99 (3d Cir. 2010).

"A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision involving an unreasonable application of clearly established Federal law." *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000) (internal quotation marks and alterations omitted). While the term "unreasonable" is "no doubt difficult to define," "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. "Under § 2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411 (internal quotation marks omitted). "The unreasonable application

test is an objective one -- a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly." *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. 2005). As the Supreme Court has recently explained, "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree on the correctness of the state court's decision.'" *Harrington v. Richter*, No. 09-587, slip. op. at 11 (U.S. Jan. 19, 2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). We have with "painstaking care" reviewed this case with this explanation in mind and have found constitutional error. It is our duty to correct it. *See Kyles*, 514 U.S. at 422.

C.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S at 87. The Supreme Court has clarified that material information must be disclosed even absent a defense request, *United States v. Bagley*, 473 U.S. 667, 682 (1985), and that the *Brady* rule applies to impeachment evidence as well as directly exculpatory evidence, *id.* at 676.

Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (internal quotation marks omitted). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 U.S. at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

The Supreme Court of Pennsylvania ruled that the Police Activity Sheet of October 25, 1982 was immaterial because Jackson was so thoroughly impeached that, ipso facto, additional evidence could not have made a difference. To be sure, "impeachment evidence, if cumulative of *similar* impeachment evidence used at trial . . . is superfluous and therefore has little, if any probative value." *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005) (emphasis in original); *see also United States v. Boone*, 279 F.3d 163, 191 (3d Cir. 2002) (finding no *Brady* violation where another witness testified to the same supposedly exculpatory information); *Tankleff v. Senkowski*, 135 F.3d

235, 251 (2d Cir. 1998) ("When a witness's credibility has already been substantially called into question *in the same respects* by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a *Brady* claim." (emphasis added)).

Yet it is patently unreasonable to presume -- without explanation -- that whenever a witness is impeached in one manner, any other impeachment becomes immaterial. In a similar context, the Supreme Court has rejected such an argument. In *Napue v. Illinois*, 360 U.S. 264 (1959), a prosecutor knowingly elicited false testimony that a cooperating government witness had not, in fact, been promised consideration in exchange for his testimony. Rejecting the government's argument that the defense had numerous other ways in which to impeach the witness, the Court held that it "[did] not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Id.* at 270.

The logic of *Napue* has been extended to the *Brady* context, both by the Supreme Court of the United States and by various federal courts of appeals. In *Banks v. Dretke*, 540 U.S. 668 (2004), the Supreme Court rejected the state's argument that no *Brady* violation had occurred because the witness "was heavily impeached at trial" and thus

that his status as a paid informant would have been "merely cumulative." *Id.* at 702 (alterations omitted). Finding that no other impeachment evidence was "directly relevant" to the witness's status as an informant, the Court ruled that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." *Id.* at 702-03. *See also Bagley*, 473 U.S. at 689 ("If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.").

We have also recognized that undisclosed *Brady* material that would have provided a different avenue of impeachment is material, even where the witness is otherwise impeached. *See Slutzker v. Johnson*, 393 F.3d 373, 387 (3d Cir. 2004) (holding that although the defendant was able to impeach the prosecution in certain respects, the suppressed information was material under *Brady* because there was a "significant difference" between the suppressed material and the information to which the defense had access); *United States v. Perdomo*, 929 F.2d 967, 969, 972 (3d Cir. 1991) (rejecting the district court finding "that the jury had an opportunity to evaluate the informant's

credibility from other damaging testimony" and concluding that "[w]hether or not the jury has had an opportunity to consider other impeachment evidence is not the correct standard for determining materiality of undisclosed information"). *But see Lisa Michelle Lambert v. Blackwell*, 387 F.3d 210, 253 (3d Cir. 2004) ("'Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" (further internal quotation marks omitted) (quoting *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir. 1996))).[3]

Other federal courts of appeals have echoed the conclusion that additional, non-cumulative impeachment material implicates *Brady*. *See United States v. Torres*, 569 F.3d 1277, 1284 (10th Cir. 2009) ("Merely because other impeachment evidence was presented does not mean that additional impeachment evidence is cumulative . . . .");

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[3]Unlike in *Lisa Marie Lambert*, the impeachment at issue here is not simply "an additional basis on which to impeach." Rather, as the First Circuit has recognized, "[c]onfidence in the outcome is particularly doubtful when the withheld evidence impeaches a witness whose testimony is uncorroborated and essential to the conviction." *Norton v. Spencer*, 351 F.3d 1, 9 (1st Cir. 2003) (internal quotation marks omitted). Here, the withheld information provided a unique basis on which to impeach -- specifically, a basis that shredded Jackson's credibility on the one point on which the jury could have inferred that he had any credibility.

Horton v. Mayle, 408 F.3d 570, 580 (9th Cir. 2005) ("However, that the jury had other reasons to disbelieve McLaurin does not render the suppressed evidence of the deal immaterial. Evidence that the prosecution promised immunity to induce McLaurin to testify as its star witness is a wholly different kind of impeachment evidence . . . ."); *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989) ("The state argues that because Trygstad was a convicted felon his credibility already was suspect and the additional information regarding his petition for commutation and pending hearing thereon would not have affected the jury's judgment as to his truthfulness. Logic of this kind has been dismissed by the Supreme Court." (citing *Napue*, 360 U.S. at 270)).

What is critical here is that the undisclosed statement by Jackson that there was another participant -- a "co-defendant," to use his word -- was not just one more piece of impeachment material to be placed in a "so what" category because Jackson had already been so thoroughly impeached. Rather, the undisclosed Police Activity Sheet would have opened an entirely new line of impeachment, and would have done far more than simply allow the defense to point out -- as it did -- that Jackson was inconsistent and often changed his story. The way we know that the undisclosed statement would have opened a new line of impeachment is that by not disclosing it, the prosecution was able to rely on Jackson's consistency in naming Reese and Lambert as the perpetrators, the *only* point on which he

was consistent at trial. The Supreme Court has instructed that we may take the Commonwealth at its word that this was important. *See Kyles*, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). Here, the prosecution's closing argument emphasized Jackson's consistency in naming Lambert and Reese as the perpetrators. (A3115.) No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of *Brady* was an unreasonable application of clearly established Supreme Court precedent.

In closing, we cannot help but observe that the evidence is very strong that Reese, not Lambert, was the shooter, even assuming that Lambert (and not Jackson, as two of the barmaids testified) was in the Prince's Lounge that night. First, it is undisputed that the .38 was the murder weapon, that the .38 was Reese's gun and carried by him that night, and that Lambert (*if* he was there) had only the .32. Second, all three barmaids described the shooter as no more than 5'7". Reese is 5'7"; Lambert is 6' to 6'1". Third, the testimony of Janet Ryan, the barmaid who suddenly remembered Lambert as having put the gun in her face, identifying him on Reese's case only "from the nose up" (although she told the police at the time of the murders that she "didn't even get a look at the man") after failing to identify him on the Commonwealth's

case because "nobody asked me," was, in a word, bizarre. (A2824, 2844, 2940-41). These examples are precisely the types of evidence which can undermine a court's faith that the verdict in question is "worthy of confidence." *Kyles*, 514 U.S. at 434. Finally, and for what it is worth (perhaps Jackson saw the havoc his testimony had wrought), we note the post-trial proffer of Jackson's affidavit, in which he says that Reese was the shooter and that Ryan was a friend of Reese's family and would never testify against Reese. The affidavit was rejected by the trial court as untimely and not in proper form. *See Lambert I*, 603 A.2d at 572.

VI. Conclusion

The judgment of the District Court is vacated, and this matter is remanded. The District Court is directed to conditionally grant the petition for a writ of habeas corpus. The Commonwealth shall retry Lambert within 120 days. If it fails to do so, Lambert shall be released.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 6, 2010

No. 07-9005

James Lambert, Appellant

v.

Jeffrey Beard, et al.

(E.D. Pa. No. 02-cv-09034)

Present: BARRY, HARDIMAN and STAPLETON,
Circuit Judges

1. Petition by Appellees for Panel Rehearing and Rehearing En Banc, which the Court may also wish to construe as a Motion to Submit the Order dated November 23, 2010 for En Banc Review

Respectfully,
Clerk/nmr

ORDER

This Court's Judgment of February 7, 2011 has rendered the Order of November 23, 2010 moot. The Order of November 23, 2010 is, therefore, VACATED and the Commonwealth's petition for

panel rehearing and rehearing en banc as to that Order is DENIED as moot.

By the Court,

/s/ Maryanne Trump Barry
Circuit Judge

Dated: February 7, 2011
nmr/cc: Thomas W. Dolgenos, Esq.
Joshua S. Goldwert, Esq.
Stuart B. Lev, Esq.
Daniel Silverman, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-9005

JAMES LAMBERT,
Appellant

v.

JEFFREY BEARD, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; WILLIAM STRICKMAN, III, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 02-cv-09034)
District Judge: Honorable Michael M. Baylson

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER,

CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and STAPLETON,* *Circuit Judges*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: March 7, 2011
nmr/cc: Thomas W. Dolgenos, Esq.
Joshua S. Goldwert, Esq.
Stuart B. Lev, Esq.
Daniel Silverman, Esq.

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*Judge Stapleton's vote is limited to panel rehearing only.

(EXCERPT)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES LAMBERT, Petitioner	:	CIVIL ACTION
v.	:	
JEFFREY BEARD, et al, Respondents	:	NO 02-9034

MEMORANDUM

Baylson, J. **July 24, 2007**

* * * *

I. Introduction

Petitioner, James Lambert ("Petitioner" or "Lambert"), a death sentenced state prisoner, filed a Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254 on December 12, 2002. By agreement of counsel, the case was placed in the civil suspense file on March 6, 2003, pending exhaustion of Petitioner's second post-conviction petition in state court, raising a *Brady* claim ("Claim 2"). This Court restored Petitioner's case to its active docket on November 4, 2005, and, after extensive briefing, held oral argument on

October 4, 2006. The parties have filed several post-argument letter briefs with the Court on a number of issues, including *Batson v. Kentucky*, 476 U.S. 79 (1986) and the recent Supreme Court decision, *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007).

* * * *

IX. Analysis of Guilt-Phase Claims

A. Claims 1 and 2

Both claims one and two deal with alleged constitutional violations arising out of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), which require the prosecutor to divulge favorable and exculpatory evidence to the defendant regardless of request, motions or other procedural issues. Claim one is a *Brady* claim regarding the alleged plea agreement between co-conspirator Jackson and the Commonwealth. Although not raised on direct appeal, this claim was considered by Judge Poserina in the first PCRA petition. (Poserina, slip op. at 36-39).

The second *Brady* claim alleges that the Commonwealth failed to provide defense counsel with five police activity sheets, police sketches of suspects, police documents relating to a prior murder committed by co-defendant Reese, and a statement made by a witness, Marie Green. This

claim was raised in the second PCRA petition, and rejected by Judge Poserina on the merits, who found that the undisclosed documents were not exculpatory or impeaching. On appeal, the Pennsylvania Supreme Court affirmed. The court found that the allegation concerning the police activity sheet dated January 14, 1983 was waived because Petitioner raised it in an untimely manner. Although the other six claims were held timely because they were based on newly discovered evidence, the Supreme Court rejected them on the merits.

Because claims one and two were adjudicated on their merits in state court, we will review them under AEDPA's deferential standard of review.[15] We review de novo the related allegation

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[15]Petitioner claims the Pennsylvania Supreme Court's decision in *Lambert-3* is not an "adjudication on the merits" because the court failed to discuss several aspects of the legal arguments made by Petitioner. However, in order to qualify as a merits decision, "it is not necessary for the state court to have thoroughly explained its analysis in its opinion." *Wright v. Vaughn*, 473 F.3d 85, 91 (3d Cir. 2006) (quoting *Chadwick v. Janecka*, 302 F.3d 107, 116 (3d Cir. 2002)).

Although the Pennsylvania Supreme Court did not specifically review the merits of the *Brady* claim relating to the police activity sheet dated January 14, 1983, the PCRA court did. (Poserina, second slip op. at 10-11). Under the principle articulated in *Fahy v. Horn*, No.Civ.A. 99-5086,

(continued...)

that prior counsel was ineffective: although Petitioner raised this claim in his PCRA petition, Judge Poserina failed to address it.

With respect to the first *Brady* claim, the record shows that the Commonwealth called the Chief of the District Attorney's Homicide Unit at trial to testify about the plea bargain made with Jackson. (N.T. Apr. 17, 1984 at 71-83). The fact that the Commonwealth made a favorable recommendation on Jackson's behalf after Jackson testified against Petitioner, does not change the facts of the testimony presented at Petitioner's trial, that no additional deal was made with Jackson. There is no evidence, only speculation, supporting this claim. Moreover, Jackson's credibility was challenged at trial with extensive impeachment evidence, including his criminal record. The trial judge also instructed the jury that, as an accomplice, Jackson's testimony came from a corrupt source, and that his prior convictions should be considered by the jury in assessing his credibility. (N.T. Apr. 24, 1984 at 45-47, 58-59). Thus, even if Petitioner could establish the existence of a "secret deal" with Jackson, there is no evidence that the Commonwealth's alleged failure to disclose this

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[15](...continued)
2003 WL 22017231 (E.D. Pa. Aug. 26, 2003), we will consider Judge Poserina's decision to be an "adjudication on the merits" under § 2254(d), and apply AEDPA's deferential standard of review. See supra pp. 21-22.

information prejudiced Petitioner. In sum, this Court cannot say, applying § 2254(d), that the Commonwealth violated Petitioner's rights under *Brady*. Trial and appellate counsel were not ineffective for failing to pursue this meritless issue.

Likewise, as to claim two, it was reasonable for the state courts to conclude that the alleged *Brady* and *Giglio* violations were not material to Lambert's guilt, considering the Commonwealth's evidence and overall circumstances of the case. The various notations and statements which Petitioner claims the Commonwealth should have disclosed are entirely ambiguous, and would have required the state courts to speculate to conclude they were favorable for Lambert and material to his guilt or punishment. Furthermore, many of the police activity sheets clearly were part of the preliminary stages of the police investigation, and "[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795 (1972). The state court decisions to this effect were not unreasonable.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES LAMBERT, Petitioner	:	CIVIL ACTION
v.	:	
JEFFREY BEARD, et al, Respondents	:	NO 02-9034

ORDER

AND NOW, this 24th day of July, 2007, it is hereby ORDERED that the Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, is DENIED.

A certificate of appealability is GRANTED, pursuant to 28 U.S.C. § 2253(c)(2), with respect to the following issues:

1. Claim Eleven: whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. Claim Sixteen: whether the penalty phase jury instructions and verdict sheet indicated that the jury

unanimously had to find a mitigating circumstance before they could give effect to it, in violation of *Mills v. Maryland*, 486 U.S. 367 (1988).

The Clerk shall close this case.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES LAMBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY BEARD, et al	:	NO 02-9034

ORDER

AND NOW, this 31st day of March, 2011, following an unrecorded telephone conference with counsel on March 31, 2011, and upon the Judgment of the United States Court of Appeals for the Third Circuit filed March 16, 2011, it is hereby ORDERED that the Petition for Writ of Habeas Corpus is conditionally GRANTED, and Petitioner shall be released if the Commonwealth fails to retry him within one hundred twenty (120) days.

BY THE COURT:

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

(EXCERPT)

[J-81-2005]
IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ

COMMONWEALTH OF PENNSYLVANIA,	:	No. 427 CAP
	:	Appeal from the
Appellee,	:	Order of the Court
	:	of Common Pleas of
	:	Philadelphia County
	:	(Poserina, J.), dated
	:	September 9, 2003,
	:	Denying Appellant's
	:	Petition Under the
	:	Post Conviction Relief
	:	Act.
JAMES LAMBERT,	:	
	:	SUBMITTED:
Appellant.	:	June 2, 2005

OPINION

MR. JUSTICE CASTILLE **DECIDED: October 18, 2005**

* * * *

The manner in which appellant obtained the alleged impeachment and exculpatory evidence underlying his *Brady* claims was extraordinary. In October 2001, proceedings were commenced before the Honorable D. Webster Keogh, the Supervising Judge of the Criminal Division of the Court of Common Pleas of Philadelphia, following a formal complaint filed by the Commonwealth regarding the improper use of subpoenas by the Federal Capital Habeas Corpus Unit of the Defender Association of Philadelphia ("Federal Defender") to obtain archived police files. At these proceedings, it was revealed that between June and October 2001, the Federal Defender improperly subpoenaed the original police files for approximately twenty-five capital cases from the Philadelphia City Archivist, apparently in an effort to circumvent the discovery requirements set forth in Pa.R.Crim.P. 902(E). On October 29, 2001, Judge Keogh ordered that the archived police files obtained by the Federal Defender be sealed, thus precluding the Federal Defender from disclosing the contents of the files they unlawfully secured. In a decision letter dated February 8, 2002, Judge Keogh concluded that the Federal Defender's actions constituted an abuse of the subpoena power to such an improper and illegal extent that he referred the matter to the Pennsylvania Disciplinary Board for appropriate action.

The original police file for the instant case was one of the archived police files obtained by the Federal Defender. In the instant serial PCRA petition, appellant's counsel, who is not contractually or otherwise affiliated with the Federal Defender, stated that while appellant's appeal of his first PCRA petition was pending before this Court, he became aware that the Federal Defender, who had been assisting counsel in the litigation of this case, were in possession of the original police file. Counsel was informed by the Federal Defender that the file allegedly contained unspecified *Brady* material. In accordance with *Lark*, 746 A.2d 585, counsel filed the present PCRA petition within the requisite sixty days of this Court's denial of appellant's reconsideration petition following our decision on his first PCRA petition. The PCRA court, per the Honorable John J. Poserina, Jr., scheduled an evidentiary hearing for September 24, 2002 for the limited purpose of hearing testimony from an attorney from the Federal Defender regarding alleged undisclosed exculpatory evidence contained in the archived police file. On September 16, 2004, however, PCRA counsel filed a motion submitting that he required the archived police file in order to prepare for the evidentiary hearing. Attached to the motion was an order directing the Federal Defender to turn over the police file to counsel. The motion did not mention Judge Keogh's existing order sealing all archived police files obtained by the Federal Defender. The PCRA court issued the order and appellant thereby obtained the archived

police file from the Federal Defender. Counsel subsequently filed a supplement to his serial PCRA petition on September 24, 2002, asserting nine Brady claims.[3]

The law governing alleged *Brady* violations is well-settled. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1194. The Supreme Court subsequently held that the duty to disclose such evidence is applicable even if there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399 (1976), and that the duty may encompass impeachment evidence as well as directly exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 3380-81 (1985). Furthermore, the prosecution's *Brady* obligation extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution. *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 1568 (1995); *Commonwealth v. Burke*, 781 A.2d 1136, 1142 (Pa. 2001).

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[3]Two of the nine alleged *Brady* violations have not been raised or discussed by appellant in his brief on appeal. Therefore, these claims are not before us.

On the question of materiality, the Court has noted that "[s]uch evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948 (1999) (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383). The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290, 119 S.Ct. at 1952 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. at 1566). "Thus, there are three necessary components that demonstrate a violation of the *Brady* strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." *Burke*, 781 A.2d at 1141 (citing *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948).

Importantly, the Court has noted that the duty imposed upon the prosecution under *Brady* is a limited one. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *see*

also Kyles, 514 U.S. at 436-37, 115 S.Ct. at 1567 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. . . . We have never held that the Constitution demands an open file policy . . . ."). This Court has also recognized *Brady*'s limited requirements, and has noted that Brady does not grant a criminal defendant unfettered access to the Commonwealth's files. *See Commonwealth v. Edmiston*, 851 A.2d 883, 887 n.3 (Pa. 2004) (defendant has no general right under the Constitution or *Brady* to search Commonwealth files); *Commonwealth v. Williams*, 732 A.2d 1167, 1176 (Pa. 1999) ("[T]he Commonwealth is, in the first instance, the judge of what information must be disclosed. . . . 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.'") (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 1002 (1987)); *Commonwealth v. Counterman*, 719 A.2d 284, 297 (Pa. 1998), *cert. denied*, 528 U.S. 836, 120 S.Ct. 97 (1999) (*Brady* is not a general rule of discovery in criminal cases).

As noted above, appellant raises seven *Brady* claims based on previously undisclosed documents found in the archived police file. In response, the Commonwealth argues that each *Brady* claim is meritless, and that appellant's arguments in support of each alleged violation either mischaracterize the content of the

documents, or are based on mere speculation. We address each *Brady* claim *seriatim*.

Appellant first claims that the Commonwealth violated *Brady* by not disclosing the police activity sheet of October 25, 1982. In this document, there is a notation that Commonwealth witness Bernard Jackson, who was the getaway driver during the robbery and an original codefendant of appellant herein, named Lawrence Woodlock as a codefendant. Appellant argues that this "statement" by Jackson is exculpatory as it is evidence that someone other than himself was involved in the robbery, or at a minimum, that someone other than himself was the shooter. Appellant argues that this statement supported the defense theory that Jackson simply made up a third robber in order to reduce the culpability of codefendant Bruce Reese. Appellant further argues that this statement could have been used to impeach Jackson's testimony at trial because it established that Jackson provided Woodlock's name prior to identifying appellant as the third robber.

The Commonwealth counters that the "statement" by Jackson in this document was actually an "ambiguously worded notation" which simply states that Jackson had named Woodlock as a codefendant without specifying whether he was naming Woodlock as a codefendant in this robbery or a previous robbery. The Commonwealth notes that Woodlock's name appears nowhere else in the

police files, was not mentioned by any witness at trial, and was not mentioned in any of the formal statements offered by Jackson to the police concerning the robbery.[4] The Commonwealth further notes that Jackson's testimony was extensively impeached at trial by both appellant and codefendant Reese; therefore, the ambiguous reference to Woodlock in this document would not have discredited him any further.

The PCRA court concluded that this document was not material as it did not create a reasonable probability that the result of the proceeding would have been different had it been disclosed. *Strickler*, 527 U.S. at 281, 119 S.Ct. at 1948. We agree. Appellant's claim that Jackson's reference to Woodlock automatically means that someone other than himself committed the shootings and robbery is purely speculative at best. The Commonwealth accurately notes that the police must not have had reason to consider Woodlock a potential codefendant in this case as his name is not mentioned anywhere else in the police

---

[4]During the investigation, Jackson offered four separate statements to the police. On October 14, 1982, Jackson identified himself, Reese, and "the dude" as the three participants in the robbery. On October 22, 1982, Jackson identified "the dude" as "Monk," which was appellant's nickname. In his third and fourth statements given on January 14, 1983 and February 6, 1983, Jackson identified "Monk" as appellant.

investigation files. Furthermore, appellant's argument that this document reveals that Jackson named Woodlock as a codefendant prior to identifying appellant is inaccurate. In his second formal statement to police on October 22, 1982, three days prior to the document at issue, Jackson identified the third participant in the robbery as "Monk," appellant's nickname. Moreover, this document would not have materially furthered the impeachment of Jackson at trial as he was already extensively impeached by both appellant and Reese. Indeed, each codefendant cross-examined Jackson on the following: every inconsistency in his four police statements; that he was testifying on behalf of the Commonwealth pursuant to a plea bargain; and that he had several open robbery charges still pending and his testimony was motivated by a desire to receive lenient sentences for those crimes. Any additional impeachment of Jackson arising from a police notation would have been cumulative. Accordingly, the Commonwealth did not violate *Brady* by not disclosing this police activity sheet as appellant has failed to show its materiality.

* * * *

OPPOSITION BRIEF

NO. 11-38
IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,

Petitioners,

v.

JAMES LAMBERT,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED
CAPITAL CASE

Petitioners set forth a factual background for the Question Presented that omits several key facts and thus skews the question presented to this Court. For example Petitioners omit that the evidence found, a police report from the homicide case at issue, filled out by homicide detectives in this case, indicated that Bernard Jackson, the *Commonwealth's only inculpatory witness*, had named someone other than Lambert as his accomplice. Nor do Petitioners explain that the trial prosecutor took advantage of the suppression of that evidence to argue repeatedly to the jury that Jackson had consistently named Lambert as his accomplice, even though the suppressed evidence showed that to be false. Properly framed, with all facts in mind, the Question Presented is a fact based question that presents no important federal questions requiring this Court's review and can be stated as follows:

> *Where the Commonwealth suppressed evidence that its only inculpatory witness, an alleged accomplice testifying in return for a very favorable deal, had, at one time, told police that someone other than Mr. Lambert was his accomplice, and where the prosecutor elicited testimony and argued to the jury that its accomplice witness, despite other inconsistencies, should be believed because he consistently identified only Mr. Lambert as his accomplice, did the Third Circuit correctly apply habeas deference when it found that Mr. Lambert's due process rights under Brady v. Maryland had been violated and that the state court was objectively unreasonable in concluding that the suppressed evidence was not material?*

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COUNTERSTATEMENT OF THE CASE[1]

The Petition for Certiorari filed in this case presents a fact bound question that sets forth no important jurisprudential question deserving of this Court's review and identifies no conflict in the lower courts needing this Court's resolution. Instead, the *Petition* seeks review only for the purposes of correcting what the Commonwealth wrongly believes to be an erroneous decision. Certiorari should be denied.

At trial (and for more than a quarter century since), James Lambert's defense was that he had no involvement in this crime. His defense has always been that the robbery was committed solely by co-defendants Bernard Jackson and Bruce Reese who, as brothers-in-law and partners in numerous prior gunpoint bar robberies, needed a scapegoat to pin the murders on after this robbery turned deadly.

But Mr. Lambert was nonetheless convicted and sentenced to death in this case based solely upon the testimony of two witnesses who provided what courts have long recognized to be among the most unreliable evidence possible: (1) the self-serving testimony of Jackson, a Commonwealth witness who received a sweetheart – and largely undisclosed – plea deal in exchange for his testimony minimizing his role and his brother-in-law Reese's role in the crime, and (2) the highly suspect identification testimony of Janet Ryan, a witness called *by codefendant Reese*, who made her first and only identification of Mr. Lambert in a suggestive courtroom confrontation during her *second* appearance at trial, eighteen months after the crime, after having repeatedly insisted that she

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[1]Respondent here, James Lambert, was the Appellant in the Court below, and is referred to herein by name or as Respondent. Petitioners here, representatives of the Commonwealth of Pennsylvania, are referred to herein as "the Commonwealth." The Commonwealth's Petition for Certiorari is cited herein as "*Petition*." References to the record are to the Appendix filed in the Court of Appeals and are cited as A followed by the page number. All emphasis is supplied unless otherwise noted.

had not even gotten a look at the gunman and could not make an identification. That was it. No physical evidence, no scientific evidence, and no statements linked Mr. Lambert to this crime.

A. The Evidence at Trial

In September of 1982, Bernard Jackson and Bruce Reese were close friends, brothers in law, and partners in crime. A1979-82; A2026-27; A2126-27. They were in the midst of an extensive crime spree of at least a dozen armed robberies in Philadelphia. Their crime of choice was to walk into a bar, rob the bar at gunpoint, and make off with the cash. See A587-94; A603; A633-34; A637; A643-663; A720-25; A734-40; A765; A1763-67.

On September 23, 1982, at approximately 8:45 p.m., two men entered Prince's Lounge at 4600 Walnut Street in West Philadelphia. One stood watch at the doorway, while the other went to the bar and pointed a gun in the face of bartender Janet Ryan. As soon as she saw the gun, Ms. Ryan dropped to the floor, screamed hysterically, and crawled into a restroom where she shut the door and remained hidden until the robbery was over. A second bartender, Sarah Clark, was ordered to get the money. As she began to retrieve the money, two customers, James Graves and James Huntley, tried to overpower the gunman. The gunman fatally shot both men with a .38 caliber weapon, and both robbers fled. A1821-37; A1881-95.

During the ensuing investigation, police showed photo lineups to the bartenders and customers, but only one positive identification resulted – bartender Sarah Clark identified Bernard Jackson as the robber who stood watch by the door. A1899-1903, A2174.[2]

Jackson told a different story. After his arrest, Jackson gave at least four statements to the police. He claimed that he sat in the car outside while Reese and a third man went inside to rob the

---

[2]As the Court below noted, another bartender, Marie Green, was 80-90% sure that the man at the top of the stairs was Jackson. Lambert v. Beard, 633 F.3d 126, 130 (3d Cir. 2011).

bar. His statements variously identified the third accomplice as "the other dude," as "Lawrence Woodlock," as "Monk," and as Mr. Lambert.

Mr. Lambert and Reese were jointly tried for the murders and robbery, and Jackson was the Commonwealth's key witness. Jackson provided the only evidence presented by the Commonwealth that implicated Mr. Lambert in the crime. But the jury never learned about Jackson's police statement implicating "Lawrence Woodlock," because the Commonwealth suppressed it. The jury also never learned the full extent of the benefits Jackson would receive as a result of his testimony. And the jury never learned about the string of bar robberies that Jackson and Reese committed together (all *without* Mr. Lambert), because the trial court excluded the evidence.[3]

In its effort to defend Bernard Jackson's credibility, the Commonwealth repeatedly focused the jury's attention on the "fact" that, although Jackson made some inconsistent statements about the events at Prince's Lounge, he consistently named Mr. Lambert as a partner in this crime. See, e.g., A2266-67, A2275 (re-direct examination of Jackson); A3115, A3125 (prosecutor's closing argument). The police report that directly contradicted this claim of consistency was suppressed by the Commonwealth.

At trial, the Commonwealth also asserted that, in exchange for his testimony, Jackson had

---

[3]Mr. Lambert could have undermined Jackson's trial testimony by presenting evidence of, and cross examining Jackson about, the long series of armed robberies of other bars that Jackson and Reese had committed together, without Lambert. That evidence would have provided direct and compelling support for the defense theory that it was Jackson and Reese who committed this bar robbery together (after all, Jackson was identified by bartender Sarah Clark as the robber who stood at the door during the crime), but then needed a scapegoat when their robbery ended in murder. The jury never heard this evidence, however, because the trial court refused to sever the trial despite the antagonistic nature of the co-defendants' defenses. The court also excluded the prior similar crimes evidence, in violation of Mr. Lambert's rights to due process, to present a defense, to compel witnesses, and to confrontation. Mr. Lambert's challenges to those rulings were rejected by the state courts and the District Court. The Court of Appeals granted Mr. Lambert a Certificate of Appealability on these and other claims, but did not reach the claim in light of its grant of relief on the Brady claim.

been permitted to plead guilty to third degree murder, robbery, and conspiracy arising out of the present incident. The Commonwealth insisted, however, that there were no promises, understandings, or inducements relating to the other robbery charges. A2021-24; A2430-33.[4] After Mr. Lambert's trial, Jackson pled guilty to five of the robbery counts and received sentences that were *concurrent* with his (12½ - 25 year) sentence for the murders and robbery at Prince's Lounge. Then, just two months after Mr. Lambert's trial, the prosecutor in the instant case, Robert Myers, appeared before Judge Marvin Halbert as Jackson pled guilty to eight additional counts of robbery. Mr. Myers asked Judge Halbert, a judge well known for his severe sentencing practices, to reduce these gunpoint robberies, which were felonies of the first degree, to second degree felonies, and further asked the court to make any sentence imposed on these robberies *concurrent* with the sentence Jackson received on his murder/robbery plea. See Commonwealth v. Bernard Jackson, CP 82-12-714-740, at A3307-08; A3310; A3317-18; A3324-26; A3328. Mr. Myers emphasized that he did not make his recommendation lightly and that he "would strenuously request" that the court adopt the Commonwealth's recommendation. A3325-26. Judge Halbert, recognizing that Mr. Myers' recommendation was unusual, went along with the recommendation. A3328-29. Thus, as a result of the Commonwealth's strenuous efforts, Jackson received *no additional prison time* for his guilty pleas to thirteen armed robberies.

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[4] For example, Arnold Gordon, Esq., chief of the Philadelphia District Attorney's Homicide Unit, testified that Mr. Jackson faced a potential sentence of 120 to 240 years imprisonment on the open robbery cases and that there had not been any negotiations between the District Attorney's Office and Mr. Jackson regarding those cases. A2433. Mr. Gordon told the jury that it was unlikely that Jackson would not receive an additional penalty for the robbery cases. A2439-40. In closing argument, the prosecutor told the jury that it had heard the entire deal, that Mr. Gordon had told the jurors what the deal was, that Mr. Jackson faced all those open cases, and that there was nothing hidden about the deal. A3117-18. The prosecutor never acknowledged, however, that he would ask another judge to reduce the severity of those open charges and ensure that Mr. Jackson would not serve a single additional day in jail for those robberies.

The jury also never learned about the string of armed robberies of bars that Jackson and Reese had committed together. The court precluded Mr. Lambert from presenting any evidence and from cross examining Jackson about his statements admitting that he and Reese had committed at least twelve other similar gun point robberies of bars in Philadelphia. A587-94; A603; A633-34; A637; A643-63; A720-25; A734-40; A765; A1763-66. The court ruled that the other crimes evidence of Reese and Jackson would not be admitted because it would be too prejudicial to Reese and "it's not relevant to this case." A1766; A2044-54. Counsel was only allowed to question Jackson about the existence of other charges against him, without any mention of Reese's role in those other similar crimes.

Other than Jackson's highly suspect testimony, the *only* evidence connecting Mr. Lambert to this crime was the surprise identification testimony from Janet Ryan, when, over defense objection, she was called *by co-defendant Reese,* after she had not made any identification when called by the Commonwealth.[5] Prior to her second appearance to testify at trial, Ryan never made any identification of the perpetrators. She initially told police that "I didn't even get a look at the man." A3530. She testified at trial that she had not gotten a good look at either perpetrator, explaining that she only "glanced" at the men as they entered the bar ("I saw them and I didn't see them") and that, as soon as she saw a gun, she dropped to the floor, crawled away, and hid in a bathroom where she could not see what happened. A1931-33. At most, she viewed the man for only a few seconds. A2831-32. By her own admission, she did not pay a great deal of attention to the perpetrator. She later provided only a vague and general description, A1929, one that matched co-defendant Reese but not Mr. Lambert, A2825-26.

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[5]In the words of the trial court, "the adversary system had switched from Commonwealth v. Defense into a Reese v. Lambert contest." A185.

Throughout all pre-trial proceedings, the Commonwealth consistently represented that Janet Ryan, like all of the other employees and customers at the bar that night, could not make an identification and was not an identification witness. A2860. Only after Ms. Ryan was called and dismissed as a non-identification Commonwealth witness, and had seen Mr. Lambert seated at defense counsel table, did she claim for the first time that Mr. Lambert looked like the man who had pointed the gun at her. A1940-43. The trial court precluded her identification testimony when the Commonwealth asked to recall her to the stand, but then allowed Ryan's identification to come before the jury when it was presented by co-defendant Reese.[6]

Thus, James Lambert was convicted of first degree murder based solely upon the fundamentally unreliable evidence given by Bernard Jackson and Janet Ryan.

B. The Suppressed Evidence and Its Impact at Trial

In the Police Activity Sheet of October 25, 1982, prepared by the Philadelphia police detectives assigned to this case and bearing the police case numbers and the victims' names in this case, Bernard Jackson named "Lawrence Woodlock" as the third defendant. Specifically, the police report stated that "Mr. Woodlock is named as co-defendant by Bernard Jackson." A3334.[7] Homicide detectives followed up on this information by showing Woodlock's photograph to the witnesses of this robbery, although no identification was made. Id.[8]

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[6]Trial counsel sought to suppress and preclude Ryan's in-court identification, but his objections were overruled. Mr. Lambert's challenges to those rulings were rejected by the state courts and the District Court. The Court of Appeals granted Mr. Lambert a Certificate of Appealability on this and other claims, but did not reach the claim in light of its grant of relief on the Brady claim.

[7]A copy of this police report is attached to this Brief as an Exhibit

[8]Throughout the course of this litigation, and in this Court, the Commonwealth has never cited to any evidence indicating that the police ever considered Woodlock to be a suspect in any other robbery committed by Jackson, or that his photo was shown to witnesses in any of those other

Jackson made this statement when police were investigating whether there were three perpetrators of this robbery and, if so, who the third perpetrator was.[9] This document was never turned over to the defense.[10]

At trial, Jackson was impeached by inconsistent statements he made to the police about the details of this robbery. In its effort to nonetheless defend Jackson's credibility to the jury, the Commonwealth repeatedly focused the jury's attention on the "fact" that, no matter what else he said, Jackson consistently named Mr. Lambert as an accomplice in this crime. On re-direct examination, the trial prosecutor questioned Jackson about his consistency in naming Mr. Lambert and Reese as the co-defendants, as follows:

> (Q): (by prosecutor) Now, when you were out on the street before being arrested on October 14, 1982, for the murder and prior to being arrested for that robbery a few days earlier than that, were there other people out on the street that you had problems with or people that you disliked intensely or had ongoing feuds with?
>
> (A): Yeah.
>
> (Q): And when you got arrested for this murder, you could have given them up on this murder, is that correct?
>
> (A): Yeah.

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robberies. The Commonwealth nonetheless contends in its *Petition* that this report may have referred to an investigation of some other crime. See infra at p.16.

[9]All of the witnesses in the bar told the police and testified at trial that there were only two perpetrators. Only Jackson claimed otherwise.

[10]Jackson gave at least four statements to the police. In the first statement of October 14, 1982, he identified a third accomplice as "the dude" or "the other dude" and never offered up any names. In the second statement of October 22, 1982, he identified the third defendant as "Monk," who he later said referred to Mr. Lambert. In the third statement – that which appears for the first time in this October 25, 1982 Police Activity Sheet that the Commonwealth withheld – Jackson identified "Lawrence Woodlock" as a third accomplice. Finally, in the fourth statement of January 14, 1983 and in his testimony at trial, Jackson identified Mr. Lambert as a third accomplice.

(Q): *But the only 2 people that you supplied to the police was Bruce Reese and Monk, who you later found out was James Lambert, is that correct?*

(A): *Correct.*

A2266-67. The prosecutor later returned to this issue:

(Q): And do you recall whether you, in all the statements you gave, the 4 or 5 statements, however many there are...*did you ever say that there were 2 other people involved in this job with you, that is, the Prince's Lounge other than Touche [Reese] and Monk?*

(A): *No.*

A2275.

In closing argument, the Commonwealth emphasized this point, arguing:

And in every statement he [Jackson] always says Touche [Reese] tells him that Lambert's the shooter. *And in every statement* he says that Touche lays it out that Touche went up to the bar to talk to the barmaid and the other person, Lambert, did the shooting.

A3115. The prosecutor returned to this point again later in his closing:

The next significant date is October 14, 1982, when Jackson was interviewed for the first time. Now on that day, Mister Jackson didn't choose to finger Antman or Underdog, or Weasel and he could have said that to the police, yeah these 2 guys did it, I don't know who their names are. And that might have been the end of the case. *He could have put the case on anybody.*

A3125.

Both the prosecutor and Jackson misled the jury. Jackson had, in fact, named another as his collaborator. But that statement was never disclosed to the defense, and was never revealed to the jury.

C. The Third Circuit's Opinion

The Third Circuit concluded that the Commonwealth's failure to disclose the police report revealing Jackson's identification of Leonard Woodlock as his co-defendant violated Lambert's due process rights under Brady v. Maryland, 373 U.S. 83, 87 (1963), and its progeny. The court also

concluded that the state court's holding that this evidence was not "material" was objectively unreasonable, particularly in light of the Commonwealth's insistence at trial that Jackson had always consistently maintained that *only* Reese and Lambert were involved with him in this crime. Lambert v. Beard, 633 F.3d 126 (3d Cir. 2011).

The court approached this case with deep respect for the implications of the matter before them, the age of the case, and the standard of review to be applied:

> We have approached this case with the utmost seriousness. We are humbled by the fact that over a twenty-eight-year period of time, the case has progressed through courts of the Commonwealth of Pennsylvania and the U.S. District Court without James Lambert having been granted relief. We, nonetheless, must decide this case consistent with what we believe our obligation to be, while according the utmost respect to the standard of review that we are required to apply.

Id. at 128. The court carefully explained the limited review required by the habeas statute:

> AEDPA created a new, highly deferential standard for evaluating state-court rulings. . . . That statute bars a federal court from granting habeas relief unless the state court's adjudication on the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . [T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 132-33 (citations and quotations omitted) (emphasis in original).

Properly recognizing that the statute requires more than a conclusion that the state court's decision was erroneous or incorrect, and quoting this Court's recent decision in Harrington v. Richter, 131 S. Ct. 770, 786 (2011), the court acknowledged that habeas relief must be denied so long as "'fairminded jurists could disagree on the correctness of the state court's decision.'" Id. at 133.

Addressing the Brady claim, the court noted the importance of Jackson's testimony to the Commonwealth's case, and that his four statements "were devastatingly inconsistent with each other and with his testimony at trial." Id. at 131. Nevertheless, Jackson claimed that he "*always*" said that Mr. Lambert and Reese were with him. Id. (emphasis by the court).

The court gave appropriate deference to the Pennsylvania Supreme Court's conclusion that the police report naming Woodlock as Jackson's accomplice was not material because Jackson had been so thoroughly impeached in other areas. Id. at 133. Nevertheless, the court concluded that:

> [I]t is patently unreasonable to presume — without explanation — that whenever a witness is impeached in one manner, any other impeachment becomes immaterial. In a similar context, the Supreme Court has rejected such an argument. In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), a prosecutor knowingly elicited false testimony that a cooperating government witness had not, in fact, been promised consideration in exchange for his testimony. Rejecting the government's argument that the defense had numerous other ways in which to impeach the witness, the Court held that it "[did] not believe that the fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Id.* at 270, 79 S.Ct. 1173.
>
> The logic of *Napue* has been extended to the *Brady* context, both by the Supreme Court of the United States and by various federal courts of appeals. In *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court rejected the state's argument that no *Brady* violation had occurred because the witness "was heavily impeached at trial" and thus that his status as a paid informant would have been "merely cumulative." *Id.* at 702, 124 S.Ct. 1256 (alterations omitted). Finding that no other impeachment evidence was "directly relevant" to the witness's status as an informant, the Court ruled that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." *Id.* at 702–03, 124 S.Ct. 1256. *See also Bagley*, 473 U.S. at 689, 105 S.Ct. 3375 ("If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.").

Id. at 134.

But even more importantly, the court recognized the impact of the suppressed evidence on

the prosecution's theory and argument at trial. The Commonwealth's strong reliance on the supposed consistency of Jackson's identification of Mr. Lambert would have been undermined by the evidence that the Commonwealth hid from the defense. The court explained:

> What is critical here is that the undisclosed statement by Jackson that there was another participant—a "co-defendant," to use his word—was not just one more piece of impeachment material to be placed in a "so what" category because Jackson had already been so thoroughly impeached. Rather, the undisclosed Police Activity Sheet would have opened an entirely new line of impeachment, and would have done far more than simply allow the defense to point out—as it did—that Jackson was inconsistent and often changed his story. The way we know that the undisclosed statement would have opened a new line of impeachment is that by not disclosing it, the prosecution was able to rely on Jackson's consistency in naming Reese and Lambert as the perpetrators, the *only* point on which he was consistent at trial. The Supreme Court has instructed that we may take the Commonwealth at its word that this was important. *See Kyles*, 514 U.S. at 444, 115 S.Ct. 1555 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). *Here, the prosecution's closing argument emphasized Jackson's consistency in naming Lambert and Reese as the perpetrators. (A3115.) No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of Brady was an unreasonable application of clearly established Supreme Court precedent.*

Id. at 135.[11]

In short, the Third Circuit applied this Court's precedent concerning Brady, as well as this Court's explanations of habeas review, and reached the unremarkable conclusion that the evidence that was suppressed was exculpatory and material, particularly in light of the weakness of the Commonwealth's evidence against Lambert, and that the state court's conclusion to the contrary was objectively unreasonable.

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[11]In contrast, the Pennsylvania Supreme Court made no mention of the prosecutor's closing argument, or his emphasis on Jackson's supposed consistency in naming Lambert. And remarkably, though the prosecutor's argument played an important role in the court's decision, the Commonwealth's *Petition* in this Court makes no mention of it, and does not discuss this "critical" aspect of the Third Circuit's decision.

REASONS FOR DENYING CERTIORARI REVIEW

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). This Court does not grant the writ simply to correct purported error by a lower court. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

In this case, the Commonwealth's request that this Court grant certiorari is based on nothing more than its dissatisfaction with the Court of Appeals opinion and its hope that this Court will correct what the Commonwealth perceives to be error. The Commonwealth identifies no split in the Circuits and no principle of law in need of this Court's adjudication. This is decidedly not a case of first impression. The Commonwealth simply asks for error correction, and this, by itself, is reason enough to deny certiorari.

Certiorari review is not appropriate where, as here, the question presented is so factually-bound that resolution of the question "would be of no importance save to the litigants themselves." Rudolph v. United States, 370 U.S. 269, 270 (1962). "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (citing Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923), and dismissing writ of certiorari as improvidently granted).

Throughout its Petition, the Commonwealth seeks to avoid the inescapable fact that lies at the heart of the Third Circuit opinion – *the Commonwealth cheated in obtaining a capital murder conviction and death sentence against Mr. Lambert.*[12] Indeed, the Commonwealth seeks to divert this Court with a number of other complaints of its alleged mistreatment in this case. The Commonwealth complains about: an interim order issued by the Third Circuit vacating Mr. Lambert's death sentence due to instructions that violated Mills v. Maryland, 486 U.S. 367 (1988) (an order that was subsequently vacated due to the grant of a new trial and thus resulted in no harm to the Commonwealth), *Petition* at 10; the court's referral to a mediator to check on the implementation of the interim order and to explore the possibility of an amicable resolution of the appeal (again an action that caused no harm to the Commonwealth), *Petition* at 11; the court's setting of a 120-day time frame for re-trial as part of a conditional writ (and allowing the Commonwealth to seek reasonable extensions of that time frame if needed), *Petition* at 17; and the manner in which Mr. Lambert's lawyers discovered that the Commonwealth had suppressed material evidence in this case.[13] The Commonwealth seeks to paint the entire Third Circuit – not just the panel in this case

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[12]In another recent death penalty case in which the Third Circuit found that Pennsylvania prosecutors had violated Brady, the court aptly noted:

> The Commonwealth has not otherwise attempted to explain why this material was not disclosed or to defend the prosecutor's failure to disclose it. Like the District Court, we are troubled by that failure. We are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense.

Breakiron v. Horn, 642 F.3d 126, 133n.8 (3d Cir. 2011).

[13]The Commonwealth asserts in its Question Presented that Mr. Lambert's lawyers obtained the suppressed evidence "unlawfully," and later accuses counsel of violating several court orders. *Petition* at 6-8. Apparently, in the Commonwealth's view, the focus of a Brady claim should not be on the prosecution's suppression of exculpatory evidence, but on the manner in which the defense uncovers the Commonwealth's misconduct. This is wrong. See Banks v. Dretke, 540 U.S. 668, 696

– as a biased tribunal because of its supposed "infringement" in Pennsylvania capital cases. *Petition* at 18-22. In addition, the Commonwealth imagines numerous other slights in the Third Circuit's recitation of the facts and history of the case.

As discussed in more detail below, the Commonwealth's complaints are misguided, and not supported by the record. But more importantly, most of the Commonwealth's complaints are irrelevant to the narrow issue upon which it seeks review – whether the Third Circuit erred in determining that Mr. Lambert was entitled to habeas relief because the Commonwealth suppressed exculpatory, material evidence. This Court should not be distracted by the Commonwealth's efforts to paint itself as the victim of a biased tribunal. Instead, it must be remembered that the Commonwealth hid material evidence from the defense, and that this misconduct lies at the heart of the Third Circuit's decision. Certiorari should be denied.

A. The Third Circuit Was Correct That Brady v. Maryland Was Violated

This Court's case law is well established. The Due Process Clause requires the prosecution to disclose evidence to the accused that is favorable to the defense and that is material. Banks v. Dretke, 540 U.S. 668 (2004); Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-56 (1972); United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles v. Whitley, 514 U.S. 419, 437 (1995). Favorable evidence includes impeachment evidence as well as evidence that exculpates the accused. Bagley, 473 U.S. at 676. The duty to enforce Brady "with painstaking

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(2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.... Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation").

The Commonwealth's complaints about counsel have not informed the decision of any of the state or federal courts below in regard to the Brady claim, and are not relevant to its request for this Court's review. In any event, no disciplinary action was taken against Lambert's counsel in connection with the discovery of the exculpatory evidence.

care is never more exacting than it is in a capital case." Kyles, 514 U.S. at 422.

A prosecutor's failure to disclose Brady material requires a new trial when the exculpatory evidence would have been material to the trial. Kyles, 514 U.S. at 432, quoting Brady, 373 U.S. at 87; see also Banks, 540 U.S. at 675-76. Evidence is "material" where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The "touchstone of materiality is . . . not whether the defendant would more likely or not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial. . . ." Kyles, 514 U.S. at 434. Thus, to show materiality, Mr. Lambert need not demonstrate that the non-suppressed evidence would have been inadequate to convict – "sufficiency of [the remaining] evidence [is not] the touchstone" of materiality. Id. at 435 n.8.[14]

In its effort to defend Bernard Jackson's credibility to the jury, the Commonwealth repeatedly focused the jury's attention on the "fact" that, no matter what else he said, Jackson consistently named Mr. Lambert as an accomplice in this crime. As described above, in both his re-direct examination of Jackson and in closing argument, both the prosecutor and Jackson misled the jury; Jackson had, in fact, named another as his accomplice. See *supra* at p.7-8. But that statement was never disclosed to the defense, and was kept from the jury. Had the evidence been disclosed, the credibility of the Commonwealth's only witness against Mr. Lambert would have been crippled.

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[14] More stringent due process standards are enforced where the State either deliberately solicits false evidence or allows false evidence to go uncorrected. Napue v. Illinois, 360 U.S. 264, 269 (1959). Even where such evidence goes only to the credibility of a witness, the state may not knowingly rely on false evidence because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors . . . that a defendant's life or liberty may depend." Id.; see also Banks, 540 U.S. at 694. In this case, at a minimum, the prosecutor had a duty to know what was in the police files, and thus had constructive knowledge of the police activity report in question. Jackson's false testimony, and the prosecutor's false argument, about the consistency of Jackson's identification of Lambert should not be allowed to stand.

The Commonwealth calls the exculpatory nature of this suppressed evidence "speculative" and posits that Jackson's reference to Woodlock may have related to some other robbery he had committed. *Petition* at 26-28. But it is the Commonwealth that speculates, as there is not a shred of evidence supporting its view. An examination of the document itself (which is attached to this Brief) shows that it was written by the detectives investigating *these murders*, that it specifically references the police case numbers *for these murders*, that *the murder victims' names* appear at the top of the report, and that the witnesses who were shown Woodlock's photo were witnesses *to these murders*. The Commonwealth has never cited to or produced any evidence that Woodlock was ever investigated for any other robbery, or that his photo was ever shown to any other witness in any other robbery. Any conclusion that the police report was not exculpatory because it did not relate *to this murder* has no evidentiary support whatsoever, is contradicted by the report itself, and would be objectively unreasonable.[15]

Jackson's identification of Lawrence Woodlock was material for a number of reasons. Mr. Lambert's defense at trial was that Jackson and Reese did this robbery by themselves and that Jackson invented a third defendant as a convenient way to distance himself from the actual in-the-bar crime and to create the false impression that Reese, his brother-in-law and longtime partner in crime, did not do the actual shooting. In short, Jackson invented the third defendant, made this third defendant the shooter, conveniently moved himself from the doorway of the bar to the getaway car, and conjured the idea that he went into the bar first just to "check it out" in order to explain away

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[15]In any event, the meaning of Jackson's identification of Woodlock should have been a question for the jury, as it would have been if the evidence was disclosed by the Commonwealth. The Commonwealth ought not be allowed to escape the consequences of its suppression of this evidence by baldly denying its obvious exculpatory value.

why a barmaid would identify him as one of the robbers.[16] The undisclosed evidence would have strongly supported – indeed proven – Mr. Lambert's defense that Jackson was making this up as he went along.

More particularly, disclosure of Jackson's statement naming Woodlock would have undermined the Commonwealth's efforts to bolster Jackson's credibility by allowing him to testify that he had been consistent in his identification of Lambert. A2266-67; A2275. The undisclosed October 25 statement proves that Jackson's testimony in this regard was false. "Reese" and "Lambert" were not the only names Jackson came up with; he did tell police that someone other than Mr. Lambert was the supposed third accomplice. In addition, assuming that Jackson was not lying when he said that there were three participants in the robbery, the statement provided substantive evidence that Woodlock, not Mr. Lambert, was the third accomplice. The Commonwealth had possession of this statement and never disclosed it to the defense.[17] This was a clear Brady violation.

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[16]One witness did indeed identify Jackson as one of the two robbers. A1899-1903; A2174. Meanwhile, witnesses denied that anyone had come in and cased the bar in the minutes before the crime, as Jackson claimed. See A1865-67; A1972.

[17] The Commonwealth objects to the Third Circuit's statement that it conceded at oral argument that the police report should have been turned over to the defense. *Petition* at 12. The tape of the oral argument reveals that, while specifically addressing the *materiality* of the suppressed police report, counsel for the Commonwealth interrupted himself and told the Court that, if the case were tried today "there's no question that a document like this would be, you know, would be produced to the defense," and, in response to Judge Barry's question, reiterated that "of course we would [turn it over]." *Third Circuit Oral Argument File* at 41:04 - 41:20, available at http://www.ca3.uscourts.gov/oralargument/ListArgumentsAll.aspx: "07-9005LambertvBeardetalPartI.wma" (last checked Aug. 2, 2011).

The Commonwealth now asserts that its comments at oral argument were meant to concede "only that the *present office policy* is to disclose all police activity sheets." *Petition* at 12 (emphasis in original). The Commonwealth does not explain how the Third Circuit could have been expected to divine the narrowness of such an irrelevant concession. The Philadelphia District Attorney's office policies have never been at issue in this case, and they were never mentioned before the Third Circuit. The Commonwealth's quibble with the Court's opinion provides no basis for certiorari review as the Court of Appeals correctly found, with or without a "concession" from the

B. The Third Circuit Correctly Found the State Court's Decision Unreasonable

The suppressed police report, reflecting the statement in which Jackson identified "Leonard Woodlock" as his accomplice, was material in a number of ways:

- as substantive evidence implicating Woodlock, not Mr. Lambert, as a participant in the crime with Jackson and Reese;
- to impeach Jackson's testimony that he had consistently named Appellant as the alleged third accomplice;
- to support the defense theory that there was, in fact, no third accomplice, and that Jackson was attempting to minimize his own role by giving whatever name would stick; and
- to demonstrate that the prosecutor's closing argument, emphasizing the consistency of Jackson's identification of Mr. Lambert, was untrue.

Nonetheless, in post-conviction proceedings, the totality of the Pennsylvania Supreme Court's analysis of this claim was as follows:

> Appellant's claim that Jackson's reference to Woodlock automatically means that someone other than himself committed the shootings and robbery is purely speculative at best. The Commonwealth accurately notes that the police must not have had reason to consider Woodlock a potential co-defendant in this case as his name is not mentioned anywhere else in the police investigation files. Furthermore, appellant's argument that this document reveals that Jackson named Woodlock as a co-defendant prior to identifying appellant is inaccurate. In his second formal statement to police on October 22, 1982, three days prior to the document at issue, Jackson identified the third participant in the robbery as "Monk," appellant's nickname. Moreover, this document would not have materially furthered the impeachment of Jackson at trial as he was already extensively impeached by both appellant and Reese. Indeed, each co-defendant cross-examined Jackson on the following: every inconsistency in his four police statements; that he was testifying on behalf of the Commonwealth pursuant to a plea bargain; and that he had several open robbery charges still pending and his testimony was motivated by a desire to receive lenient sentences for those crimes. Any additional impeachment of Jackson arising from a police notation would have been cumulative. Accordingly, the Commonwealth did not violate *Brady* by not disclosing this police activity sheet as

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Commonwealth, that disclosure was required under Brady. See Breakiron, 642 F.3d at 131, n.8 (discussing the inadequacy of a similar concession with regard to a Brady claim).

appellant has failed to show its materiality.

Commonwealth v. Lambert, 884 A.2d 848, 855-56 (Pa. 2005); A132.

The Third Circuit correctly found that the state court's analysis was an unreasonable application of this Court's Brady cases. As discussed supra, at p.9, the Court followed this Court's most recent opinions and applied the correct standard of review under the habeas statute,

First, it must be noted what the state court did not discuss. The court did not address the exculpatory nature of the evidence, the fact of its non-disclosure, or the Commonwealth's false portrayal of Jackson's consistency in naming Mr. Lambert as his accomplice. And the court did not address the clear support the evidence offered to Mr. Lambert's defense that Jackson was trying to name any alleged third accomplice in order to support his story that he was only a getaway driver and not one of the two armed robbers in the bar. In ignoring these crucial points, which in and of themselves establish the materiality of the evidence, the state court's decision failed to adjudicate the core of Mr. Lambert's claim. As the Third Circuit correctly found, the omission of these considerations from the state court's materiality analysis rendered its decision an unreasonable application of Brady, Giglio, Napue, and Kyles.

Both the state court, and the Commonwealth here, have ignored the key facts that make this evidence so important, and so material – the prosecutor's emphasis on the supposed consistency of Jackson's identification of Lambert and the suppressed evidence's direct contradiction of the prosecutor's evidence and argument in that regard. The prosecutor's evidence and argument cannot be so ignored. Materiality must be examined within the context of the actual trial. Kyles, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses"). Here, the prosecutor made Jackson's "consistency" the centerpiece of his case against Mr. Lambert, twice

eliciting testimony about that "consistency" from Jackson and twice arguing the import of that testimony to the jury. See supra at 7-8. The suggestion that Jackson's actual *inconsistency* in his identification was not material is simply belied by the prosecutor's trial presentation. As the Third Circuit concluded:

> Here, the prosecution's closing argument emphasized Jackson's consistency in naming Lambert and Reese as the perpetrators. (A3115.) No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of *Brady* was an unreasonable application of clearly established Supreme Court precedent.

Lambert, 636 F.3d at 135.

The conclusion of the Pennsylvania Supreme Court that the suppressed evidence would have been cumulative to other areas of impeachment was also objectively unreasonable. The fact that Jackson was cross examined, and his credibility attacked, in *other* areas, does not negate the materiality of *this* evidence. See Banks, 540 U.S. at 702 (rejecting the state's argument that no Brady violation had occurred because the witness "was heavily impeached at trial" and that additional impeachment would have been "merely cumulative"); accord Bagley, 473 U.S. at 689. Indeed, the prosecutor emphasized Jackson's consistency – which we now know was illusory – precisely because he understood that it was material. The suppressed evidence would have impeached a part of Jackson's testimony that was otherwise unimpeached and upon which the prosecutor relied. The Third Circuit was correct in finding the state court's analysis unreasonable. The Commonwealth's suggestion that the Court paid lip service to the standard of review, but actually applied some other standard, is without support and provides no basis for the grant of certiorari review.

C. The Commonwealth's Arguments Do Not Support a Grant of Certiorari

1. The Commonwealth's criticisms of the Third Circuit are inaccurate and misleading

The Commonwealth devotes much of its Petition to a broadside attack on the Third Circuit's capital jurisprudence, claiming that the Third Circuit is to blame for the Commonwealth's failure to institute an "effective death penalty in Pennsylvania." *Petition* at 18-22 (internal quotation omitted). The Commonwealth misstates and misapprehends the Third Circuit's case law. In a number of the cases cited in support of the Commonwealth's assertion, the Third Circuit actually *reversed* grants of relief by the District Court. For example, the Commonwealth cites Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009), for the proposition that "the Third Circuit has set aside state judgments" and awarded a "new penalty phase." *Petition* at 19 n.8. In fact, in Thomas, the Third Circuit *vacated* a grant of penalty phase relief. 570 F.3d at 130 ("we disagree with the District Court that Thomas' sentence should be vacated"). The Third Circuit has frequently done the same in other cases. Lewis v. Horn, 581 F.3d 92 (3d Cir. 2009) (affirming denial of guilt phase relief, vacating grant of new penalty phase, and remanding for further proceedings); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008) (same); Lark v. Secretary Pennsylvania Department of Corrections, — F.3d —, 2011 WL 2409297 (3d Cir. 2011) (vacating grant of new trial and remanding for further proceedings); Morris v. Beard, 633 F.3d 185 (3d Cir. 2011) (same); Saranchak v. Beard, 616 F.3d 292 (3d Cir. 2010) (same); see also Williams v. Beard, 637 F.3d 195 (3d Cir. 2011) (affirming denial of all relief in a capital case); Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007 (same). Thus, an accurate account of the Third Circuit's recent case law belies the Commonwealth's complaint that the Third Circuit somehow impedes capital punishment in Pennsylvania.

Further, although the Third Circuit has found Brady violations and ineffective assistance of

defense counsel in other Pennsylvania capital cases, that Court has routinely denied relief in capital cases from Delaware. E.g., Jackson v. Carroll, 161 Fed. Appx. 190 (3d Cir. 2005) (affirming District Court's denial of all relief and vacating certificate of appealability); Shelton v. Carroll, 464 F.3d 423 (3d Cir. 2006) (denying all relief); Gattis v. Snyder, 278 F.3d 222 (3d Cir. 2002) (same); Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000) (same); Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000) (same); Dawson v. Snyder, 234 F.3d 1264 (3d Cir. 2000) (same) (Table); see also Steckel v. Carroll, 02-436-JJF, 2004 WL 825302 (D. Del. 2004) (denying all relief and denying certificate of appealability). In short, there is neither an anti-death penalty nor an anti-Pennsylvania bias from the Court.

Finally, the Commonwealth's argument rings hollow given that, as here, *its own misconduct* lies at the heart of many of the cases that have been granted relief in the Third Circuit. E.g., Wilson v. Beard, 589 F.3d 651, 664 (3d Cir. 2009) ("the Commonwealth does not and, in fact, cannot, seriously dispute that the prosecution 'suppressed' the information" where an investigator for the Philadelphia District Attorney's Office escorted a witness to a psychiatric hospital on the day the witness testified and had a financial relationship with another witness; a third witness' criminal history was in the prosecutor's file but was not disclosed); Hardcastle v. Horn, 332 Fed.Appx. 764, 766 (3d Cir. 2009) (upholding the District Court's factual finding that the Philadelphia District Attorney's Office engaged in intentional racial discrimination); Breakiron v. Horn, 642 F.3d 126, 129 (3d Cir. 2011) (explaining that the Commonwealth was not appealing grant of new murder trial in light of Brady violation); Simmons v. Beard, 590 F.3d 223, 234 (3d Cir. 2009) (Commonwealth conceded that it suppressed four pieces of evidence at trial). It is thus odd for the Commonwealth to complain that "this is the *fourth* recent Third Circuit decision in the past two years," *Petition* at 21 (emphasis in original), granting habeas relief on Brady grounds, where it was the

Commonwealth's own misconduct that led to the grant of relief. If anything, the successful Brady claims in Pennsylvania suggest a need for the federal courts to provide even closer scrutiny of prosecutorial behavior.

2. The Third Circuit did not invent or omit important facts

The Commonwealth next claims that the Third Circuit "omitted important facts, and invented others." *Petition* at 28. To support this claim, the Commonwealth makes two accusations. It first asserts that, "in its haste to portray Bernard Jackson's trial testimony as unbelievable, the panel actually invented an inconsistent pre-trial statement that Jackson never made . . . [to wit, that] Jackson first told police that Reese, not Lambert, did the shooting." Id. Without citation to the record, the Commonwealth erroneously denies that Jackson made such a statement. The record reveals that the Third Circuit was correct.

The Third Circuit actually cited the relevant portion of the record. See Lambert, 633 F.3d at 131 (citing A2002). There, Jackson's trial testimony went as follows:

Prosecutor:	Who did the talking when they got in the car?
Jackson:	Bruce.
Prosecutor:	And what did he say?
Jackson:	He just shot two people.
Reese's counsel:	Could I hear that read back? I'm sorry.
Court Reporter:	He just shot two people.
Lambert's counsel:	We?
Court Reporter:	He.
Prosecutor:	Is that correct, Mister Jackson?
Jackson:	Correct.

A2002. This testimony was consistent with that of Detective Kelhower, who testified at a pre-trial hearing that after his arrest Jackson initially implicated only Bruce Reese. The detective testified:

Prosecutor:	Now, as a result of interviewing Mr. Jackson, what if anything did you do?
Detective:	After the arrest of Mr. Jackson, he implicated one of the defendants in his statement.
Prosecutor:	And, which one was that?
Detective:	It was Mr. Bruce Reese.
Prosecutor:	And--
Detective:	On the first statement, on the original statement.

A310-11. The Third Circuit thus accurately described the record, and the Commonwealth's unsupported contention that Jackson never identified Reese as the shooter is plainly incorrect.

Next, the Commonwealth claims that the Third Circuit "did not mention that Lambert *confessed* to police that he was with Reese and Jackson on the night of the murders." *Petition* at 29 (emphasis in original). The Commonwealth goes on to argue that this supposed "confession" is important to the materiality analysis, because the Commonwealth could have introduced the "confession" in rebuttal – assuming it had not, instead, suppressed the evidence of Jackson's inconsistent statement. See id.

The Commonwealth's argument is breathtaking: (a) in fact, there was no "confession," because Lambert's statement, denying any participation in the crime, was exculpatory; (b) *the Commonwealth* strenuously – and successfully – argued at trial that Lambert could not introduce the statement in his own defense because it was exculpatory; and (c) the Third Circuit, in any event, could not have credited the Commonwealth's creative argument, because the Commonwealth raised it for the first time in oral argument.

(a) Mr. Lambert never "confessed" to anything. He acknowledged that he met Jackson and Reese (for the first time) at a party on the night of the crime, and that he spent part of the evening with them. This evidence was not contested at trial. See A1983-84. But Mr. Lambert denied in his statement – as he always has denied – that he was with Jackson and Reese when they robbed the bar. At trial, the Commonwealth thus accurately characterized Lambert's statement as "exculpatory," "self-serving" "hearsay," because "the fact that they got together at somebody's house before or afterwards isn't itself a crime." A2946-47, A2954; see also A2956-57 (prosecutor arguing that "it's an exculpatory statement. He doesn't implicate himself. . . . He says he wasn't there in the robbery.").

(b) At trial, Lambert sought to introduce his "confession" to be considered by the jury, *but the Commonwealth objected* because of the *exculpatory* nature of that "confession." The trial court sustained the Commonwealth's objection and refused to permit Lambert's counsel to introduce the exculpatory statement. A2972; A2975-77. It is incomprehensible for the Commonwealth to now argue that the "confession" it successfully excluded should now be used to defeat the materiality of the evidence it failed to disclose.

(c) Prior to oral argument in the Third Circuit, the Commonwealth never raised in these proceedings its current argument that Lambert "confessed" to the crime and that the Commonwealth's Brady violation should therefore be found immaterial. In *response* to oral argument by Lambert's counsel, the Commonwealth made this argument for the first time. The Third Circuit does not generally consider arguments raised for the first time on appeal. Delaware Nation v. Pennsylvania, 446 F.3d 410, 416 n.9 (3d Cir.2006). This is all the more true where an argument is raised for the first time *at oral argument* on appeal. Pichler v. UNITE, 542 F.3d 380, 396 n.19 (3d Cir. 2008); see also Tomasko v. Ira H. Weinstock, P.C., 357 Fed.Appx. 472 (3d Cir.

2009) ("It would be unfair to permit Weinstock to prevail on arguments raised for the first time at oral argument, a method of proceeding that can deprive one's opponent of any meaningful opportunity to respond.").

In short, the Commonwealth's argument is baseless and, in any event, waived.

3. The Third Circuit did not make "credibility determinations"

The Commonwealth takes further issue with the Third Circuit's materiality analysis, criticizing the panel for purportedly making a credibility determination when it characterized Janet Ryan's eyewitness identification as "bizarre." *Petition* at 30-31. Here are the circumstances that led to the Third Circuit's characterization:

- Ms. Ryan, in her statement to the police after the shooting, said:

> I was facing away from the man with the gun. He was behind me, to my left, I don't even recall seeing him come in. I just turned and saw him pointing the gun in my face and I ran. *I didn't even get a look at the man.*

A3530; A2833-34.

- When called to testify at trial, eighteen months later, Ms. Ryan confirmed much of her statement to the police. She testified:

> A young man walked over to where I was working – I was just standing at that time. ...he pointed the gun at me.... I didn't pay any attention when they came in the door. I saw them and I didn't see them.... I just glanced at them and looked away.

A1927-28, A1931, A1933.

- She went on to testify that, immediately after the gun was pointed at her, she "hit the floor and scrambled my way back to the ladies room and locked the door." A1928. While hiding in the bathroom, Ms. Ryan did not see anything further, but heard the two gunshots.

- Before trial and during her testimony for the Commonwealth, Ms. Ryan could not identify either co-defendant – or anyone else – as an alleged perpetrator, although the Commonwealth showed her photographs of at least one of the defendants. A1947.

- After she left the witness stand, Ms. Ryan met with the prosecutor outside the courtroom.

> The prosecutor subsequently reported to the court that Ms. Ryan now thought that Mr. Lambert looked like the man who had pointed the gun at her. A1940-43. The prosecutor sought to recall Ms. Ryan to the stand to make an identification, but the court sustained both co-defendants' objections to her testimony. A1949-50.
>
> However, co-defendant Reese later called Ms. Ryan as his witness, and the court overruled Mr. Lambert's objection. A2779-80. Ms. Ryan was allowed to identify Mr. Lambert, sitting at the defense table, as the man who pointed the gun at her. She admitted that the shooter was about the same height as Reese (approximately five foot seven inches tall) and shorter than the victims, each of whom was around six foot tall. A2826, A2844. Mr. Lambert, who was at least as tall as the victims, did not match that description. A2844.

Under these circumstances, the Third Circuit did not err in rejecting the Commonwealth's argument that Ryan's identification testimony rendered its Brady violation immaterial, and the panel did not make an improper credibility determination. The panel's description of Ryan's testimony as "bizarre" was, if anything, charitable to the Commonwealth.

The Commonwealth closes with several additional complaints, most of which do not merit further discussion. Nonetheless, as to the Commonwealth's protest that there was not evidence that Reese was the shooter, *Petition* at 32-33, it should be noted that Jackson, the Commonwealth's star witness, testified that "Reese carried the murder weapon" see A 2276-77, when they entered the bar. Further, as the Third Circuit recognized, several witnesses testified that the shooter was (like Reese) shorter than the victims, while Lambert was at least as tall. Lambert, 633 F.3d at 135. To this, we can add that Reese and Jackson had a history of committing armed robberies of bars together and that, contrary to his own testimony, Jackson was identified as the robber inside the bar who stood at the top of the stairs.

CONCLUSION

The Petition for Certiorari filed in this case presents a fact bound question that sets forth no important jurisprudential question deserving of this Court's review and identifies no conflict in the lower courts needing this Court's resolution. Instead, the *Petition* seeks review only for the purposes of correcting what the Commonwealth wrongly believes to be an erroneous decision.

Although the Commonwealth disagrees with the outcome of the Third Circuit's thorough analysis, it is clear that the Commonwealth's complaints are based on an inaccurate and incomplete understanding of the record, and that there is no basis for certiorari review. In truth, twenty-seven years after Mr. Lambert was wrongfully convicted and sentenced to death, and twenty-seven years after the Commonwealth suppressed the crucial evidence that facilitated this injustice, the Third Circuit finally held the Commonwealth to account for its misconduct – and finally vindicated Mr. Lambert's long-forsaken right to due process of law. The Third Circuit's decision should not be disturbed.

WHEREFORE, for the reasons set forth herein, this Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,

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Dated: August 4, 2011

EXHIBIT

1

ACTIVITY SHEET # 2 Platoon Monday, 10/25/82 8A 4P Tour Sgt. Stroka/Lt. Hansen

H-82-268
H-82-269

Deceased: James HUNTLEY
James GRaves

Assigned/Kelhower

A Photo display was shown to the below listed person, Photo display contained a Lawrence WOODLOCK 27 M/M res. 5333 Walnut St. PFN # 477095 Mr. WOODLOCK is named as co-defendant by Bernard JACKSON.
No identifition was made.

Sarah CLARK 5511 Saybrook Ave. Marie GREEN 5227 Pine St.

A Survey was made of the area 53RD. & Walnut St. to found Lawrence WOODLOCK Neg. results.

R4
3334

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 24 2011
OFFICE OF THE CLERK

No. 11-38

In the Supreme Court of the United States

JOHN E. WETZEL, et al.,

Petitioners,

v.

JAMES LAMBERT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Court of Appeals granted Lambert a new trial based on a claim of undisclosed evidence under Brady v. Maryland.[1] The disputed document, an unattributed note from internal police files, was improperly seized by Lambert's lawyers many years after his trial. The meaning of this document is hotly disputed – the Pennsylvania Supreme Court rejected Lambert's interpretation of it as "speculative" – but the Third Circuit did not even mention this disagreement.

In addition to its lopsided and incomplete analysis of the Brady issue, the Court of Appeals has issued a number of extraordinary orders in this case. This pattern has continued: A few days ago, the panel ordered that despite the pendency of this *Petition for Certiorari*, any extension of the retrial deadline must be conditioned on Lambert's immediate release from Pennsylvania's death row into the general prison population. This intrusion into the internal operations of the state prison system is unjustified, and beyond the powers defined by the habeas statute. See 28 U.S.C. §§ 2241, 2254.

1. The Petition presents an important question deserving of this Court's review.

The document at issue, a police "activity sheet," concerns Commonwealth witness Bernard Jackson. Early in the investigation, Jackson told police that he had committed this crime with two other men,

---

[1] 373 U.S. 83 (1963).

Lambert (who he identified by his nickname, "Monk") and Bruce Reese; Jackson also confessed to about a dozen other armed robberies. According to the activity sheet, Jackson subsequently identified someone named "Lawrence Woodlock" as a "co-defendant" – the note does not say *in what case* Woodlock was a "co-defendant." The activity sheet also says that police showed Woodlock's picture to two witnesses in *this* case, who did not recognize him. The record contains no other references to "Lawrence Woodlock;" it seems likely that Jackson identified him as a participant in one of his many *other* robberies, and police simply confirmed that Woodlock had nothing to do with *this* case.

The Pennsylvania Supreme Court held that this "activity sheet" was ambiguous and its meaning speculative. The Third Circuit, however, did not even entertain this possibility, let alone explain why this conclusion had been unreasonable. And while the state supreme court also found that the disputed document would not have made any difference anyway, the Court of Appeals came to the opposite conclusion by re-characterizing and re-weighing the facts in a way that the state courts (or the jury) would hardly recognize.

Lambert's first and primary argument against *certiorari* is that there is "no important jurisprudential question" here; because the case is hopelessly "fact-bound," he says, it is not a good candidate for this Court's review. *Response* at 1. But the proper application of the habeas deference standard is indeed an important issue. This Court has not yet applied the deference standard to a Brady claim, and while such claims can be factually complicated, the issues here

are rather clear. For example, the Third Circuit's failure to *consider* the note's possible ambiguity is error by itself, as is the panel's reliance on non-existent evidence in its materiality analysis, or its cherry-picking of evidence in assessing Brady materiality. An opinion explaining these principles would be helpful to the lower federal courts, as cases involving similar issues continue to arise with regularity. See, e.g., Montgomery v. Bobby, Nos. 07-3882/3893 (6th Cir., Aug. 22, 2011) (split *en banc* decision denying relief on Brady issue arising from state capital case); LaCaze v. Warden, 645 F.3d 728 (5th Cir., June 29, 2011) (granting habeas relief on Brady claim), opinion amended on denial of rehearing *en banc*, --- F.3d ---, 2011 WL 3300677 (5th Cir., Aug. 2, 2011) (amending statement of materiality standard).

That a Brady claim can be bound up with facts – like claims of counsel's ineffectiveness – is no vaccination against *certiorari* review, especially in a case like this where the legal issues are plainly posed. Given the fundamental mistakes made by the Court of Appeals, and the remarkable tone of its opinion, this Court's attention is fully justified.

2. *As the state supreme court held, the meaning of the undisclosed evidence is unclear.*

Lambert's other main strategy is to assume, as did the Third Circuit, that the "activity sheet" is not ambiguous at all. For the most part, he speeds past any dispute, and aggressively refers to the note as a full-blown "statement" in which Bernard Jackson unambiguously identified Woodlock as the "third accomplice," or "third defendant." *Response* at 3, 6, 7 n.10, 16, 17. The disputed document does not use

these words, however, and that's the dispute: the state courts did *not* agree with this conclusory interpretation.

At one point, however – and unlike the Court of Appeals – Lambert does attempt to explain why he thinks the state court was wrong, and why it is likely that the activity sheet reflects a full-blown accusation that the mysterious "Lawrence Woodlock" was a participant in *this* case. *Response* at 16. This explanation is not particularly convincing: Lambert states only that the note "was written by the detectives investigating *these murders*, [it] references the police case numbers for *these murders*" (emphasis in original), and Woodlock's picture was shown to witnesses in *this* case (who did not recognize him). But none of that is in dispute – the question is why Woodlock's name was raised in the first place. If Woodlock was identified as a participant in one of Jackson's *other* robberies, and witnesses to *these murders* did not recognize his picture, that is not a Brady violation.

Perhaps sensing that the activity sheet is indeed ambiguous, Lambert spends most of his time on other arguments. He tries to reverse the burden of proof, accusing the Commonwealth of not presenting a "shred of evidence," *Response* at 16, that Woodlock was not involved in this crime. But this is *Lambert*'s claim; it is *Lambert's* burden to demonstrate that the state courts were unreasonable in denying relief.[2]

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[2] One reason there is no evidence about who "Woodlock" was, is that there has never been a hearing on the question. To be clear: the Commonwealth has always argued, and still believes, that the

The fact is, the language of the disputed document poses a problem for Lambert: The activity sheet says that Bernard Jackson called "Lawrence Woodlock" a "co-defendant," but that is an odd word to choose. *This* case had not even passed the preliminary investigation stage, so if Jackson really used the term "co-defendant" he was referring to another case. That would make sense, because Jackson had recently confessed to about a dozen robberies committed with a number of different people, some of whom he had earlier identified only by their nicknames. *Petition* at 3-4.[3] On the other hand, if Jackson did *not* use the word "co-defendant," what word *did* he use? Is the word "co-defendant" an invention of the police investigator, or the person who typed this note? Lambert's present counsel use all sorts of misleading words to describe Woodlock as a "collaborator" or "accomplice" or "participant," even though the note itself uses *none* of these terms. Perhaps the unidentified author of the note was similarly inventive – the activity sheet does not purport to be verbatim.

Brady claim should be denied without a hearing – the activity sheet is too speculative, and the state courts' rejection of the claim was reasonable. But if the courts disagree, and if it is otherwise lawful, the proper next step would obviously be a hearing, rather than an immediate grant of relief.

[3] Lambert states that Jackson confessed to committing a string of armed robberies *with Reese* (*Response* at 2-3 & n.3); he suggests that Reese was the only likely co-conspirator. But Jackson actually said he committed robberies with Reese *and several other people*, in various combinations, sometimes not involving Reese at all. *Petition* at 4 n.1.

3. The Third Circuit relied on a non-existent statement by Jackson.

In describing Jackson as a thoroughly unreliable witness, the Court of Appeals stated that Jackson first told police that the co-defendant, Reese, had admitted to being the shooter (rather than Lambert). App. 15. If this were true, it would be important, because this statement would amount to a prior inconsistent story regarding the identity of the shooter; but Jackson told police no such thing. *Petition* at 13-14. Lambert's argument in response is hard to fathom. He argues that Jackson *did* make such a statement, but on closer inspection, he only means that the panel was making an inference that was somehow "consistent" with the record. *Response* at 23-25. The panel, however, presented the existence of this inconsistent statement as undisputed fact, not an "inference." In any event, there is no evidence *at all* that Jackson ever made such a statement, inferential or otherwise.

In this portion of his *Response*, Lambert cites to two portions of the trial transcript, neither of which reflect any statement to police by Jackson in which he identified a shooter other than Lambert. First, Lambert quotes a portion of Jackson's trial cross-examination (where Jackson's use of the pronoun "he" created some question about whether Reese described *Lambert* as the shooter, or *himself* as the shooter). This was what the Third Circuit cited too, but it has nothing to do with any statement by Jackson *to the police*.[4] Second, Lambert briefly quotes a Detective

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[4] In any event, neither Lambert nor the Court of Appeals acknowledge that later in his testimony, Jackson stated he *did not*

who testified that Jackson "implicated one of the defendants" in his first statement, that is, Bruce Reese. *Response* at 24.

Lambert's use of the Detective's testimony to suggest that Jackson previously identified Reese as the *shooter*, is almost comically misleading. In his first statement to police, Jackson did indeed "implicate" Bruce Reese by name. In the very *same* statement, he told police that the *other* robber, who he identified only as "the dude," *admitted to being the shooter. Third Circuit Appendix* at 2080. Later, he told police that "the dude" was Lambert. Jackson did not tell police, in any of his statements, that Reese was the shooter. That is a fact. The Third Circuit misunderstood the record, and either Lambert misunderstands it as well, or he is deliberately misrepresenting it.

4. *The prosecutor's arguments about Jackson's consistency as a witness are beside the point.*

Lambert repeatedly asserts that *if* Bernard Jackson had ever identified "Lawrence Woodlock" as the third robber, this would have been important, because it would have undercut the prosecution's argument that Jackson was a consistent witness. *Response* at 17. But Lambert skips a step – this doesn't answer the *first* question of what Jackson actually said. Only if Jackson actually identified Woodlock as the third robber, does this materiality argument even become relevant. Further, if Jackson truly once did identify Woodlock as a co-conspirator in this case, then the

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mean that Reese identified himself as the shooter, and any other impression was a mistake. *Third Circuit Appendix* at 2184-86.

trial would have unfolded very differently, on both sides, as explained below.

5. *The prosecution could have used Lambert's own statement to police as a rebuttal to any suggestion that "Lawrence Woodlock" was involved in this crime.*

If Lambert had attempted to pin this crime on someone named Woodlock, then the prosecution could have responded with Lambert's own statement, where he admitted to police that he had been with Reese and Jackson on the night of the murder. (Lambert told police that he had been dropped off before the crime, and picked up again afterwards.) Lambert's story is hard to believe, and it especially fails to square with the "Woodlock" theory – Lambert would now have to convince the jury that Reese and Jackson dropped Lambert off, picked up Woodlock, murdered two people, dropped off Woodlock, and picked up Lambert again, all within a few hours, with Woodlock afterwards fading into oblivion – no one else having identified or mentioned him. It is not likely that a jury would have believed this. See *Third Circuit Appendix* at 2954 (Trial judge observes, "I can't imagine the jury swallowing that").

But the Third Circuit did not acknowledge that Lambert had even given a statement to police. Lambert tries to blunt the impact of this omission by insisting that the Commonwealth is wrong to discuss his statement *at all*. First, he says that the Commonwealth is changing its strategy, having argued at trial that Lambert's statement should be excluded from evidence. *Response* at 24-25. But *both* sides would be changing their arguments; this is what

happens when additional evidence surfaces after trial, which is one reason why courts must tread carefully in assessing the materiality of new evidence. Here, Lambert's lawyer only attempted to use his client's statement after Lambert was identified as the shooter by an eyewitness. In his view, apparently, the risks in using the statement (placing Lambert in the presence of the other gunmen that night) had become outweighed by the benefits (according to the statement, Lambert had been dropped off elsewhere). If Lambert tried to accuse a third party named "Lawrence Woodlock," the risks and benefits would shift again. Now, the statement's benefit to the *prosecution* (Lambert's own story places him in the presence of Reese and Jackson, *and* it undermines the Woodlock theory) would outweigh its risks (according to the statement, Lambert had been dropped off). Predicting such changes is a necessary part of materiality analysis. See Wong v. Belmontes, 130 S. Ct. 383, 386 (2009) (prejudice analysis must not only include trial evidence and disputed new evidence, but also "[other] evidence that almost certainly would have come in with it").

Lambert also complains that the Commonwealth did not discuss Lambert's police statement below until oral argument. *Response* at 24-26. But the Commonwealth has always argued that the activity sheet was not material; this Court has explained that a proper materiality analysis *must* take into account *all* relevant circumstances. United States v. Bagley, 473 U.S. 667, 683 (1985). Each fact is not a separate affirmative defense. On the contrary, it is a mistake to artificially separate the relevant facts and omit only some of them. See Kyles v. Whitley, 514 U.S. 419, 436

(1995) (for materiality purposes, evidence must be assessed collectively, not item-by-item).

6. *The Commonwealth did not concede at oral argument its legal obligation to disclose the activity sheet.*

Lambert dismisses as mere "quibbling" whether the Commonwealth conceded a legal obligation to disclose the disputed police note. *Response* at 17 n.17. This is not a "quibble." The Court of Appeals seemed to think that this supposed "concession" allowed it to avoid the question of what the note *meant*. On the contrary, the Commonwealth's point was only that the Philadelphia District Attorney's Office would now routinely disclose this kind of activity sheet. But this is no license to avoid a proper application of Brady and the habeas deference standard.

7. *The other Brady claim is irrelevant.*

Lambert also discusses an entirely different Brady allegation – that the prosecution did not disclose the full extent of its agreement with witness Bernard Jackson. *Response* at 3-4 & n.4. This is classic misdirection. The state trial court rejected this claim, finding *as a fact* that there was no undisclosed deal. Commonwealth v. Lambert, No. 8308-3432 (C.P. Phila, 2000) ("The Commonwealth informed the jury of all benefits that Jackson had received ... there was no further deal or agreement"). This finding is presumed correct in federal court, and indeed the district court also rejected this claim. Lambert v. Beard, 2007 U.S. Dist. LEXIS 54047, *31 (E.D. Pa.) ("there is no evidence, only speculation, regarding this claim"). The Commonwealth's *Petition for Writ of Certiorari*

concerns an entirely different issue. Lambert is simply trying to obscure the clear mistakes made by the Third Circuit.

8. *The Third Circuit's treatment of this case remains disturbing.*

Finally, Lambert defends the Third Circuit's heavy-handed approach to this case, and dismisses any complaints as "irrelevant." *Response* at 13-14. He insists, for example, that there was nothing wrong with the panel's "interim order" directing summary relief on an entirely different claim but deferring a full explanation, and in the meantime requiring Lambert's immediate release from death row. It is hard to imagine how this order – granting coercive relief on a request that was not even before the Court – did not prejudice the Commonwealth, especially because it was classified as *precedential*. In any event, the Third Circuit's actions, like its suggestion that the Commonwealth was wrong to prosecute Lambert for first degree murder in the first place, leave the distinct impression that the panel's approach to this case has been punitive and unconnected to any particular claim or argument.

Further, a few days ago, the Court of Appeals signaled that its approach to this case remains unchanged. On July 27 – after the Commonwealth filed the *Petition for Writ of Certiorari* – the panel ordered that any extension of the retrial deadline, even for a few months pending this *certiorari* petition, be premised on Lambert's *immediate* release from death row into the general prison population. The Commonwealth has asked for another stay of this latest order (this request is still pending), but once

again, the panel's determination to impose extraordinary and immediate conditions, despite the Commonwealth's right to review, suggest the need for this Court's intervention.[5]

CONCLUSION

For the reasons set forth above, and in the *Petition for Writ of Certiorari*, petitioners request that this Court grant the petition for writ of *certiorari*.

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[5] In its *Petition*, the Commonwealth pointed out that the Third Circuit routinely reverses Pennsylvania capital convictions. *Petition* at 18-21. Lambert responds that the Third Circuit's reluctance to allow executions is confined to Pennsylvania. *Response* at 21-22. That is not exactly comforting. These cases arose in counties all over the Commonwealth, involving different prosecutors, judges, defense lawyers, and police. It is hard to believe that all were nevertheless contaminated by an atmosphere of error that abruptly stops at the Delaware border.

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